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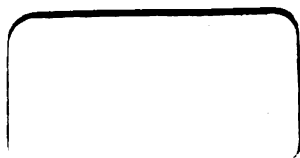
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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

C. P. POMEROY,
REPORTER.

VOLUME 145.

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ORGANIZATION OF SUPREME COURT.

[Constitution, article VI, section 2.]

SEC. 2. The Supreme Court shall consist of a chief justice and six associate justices. The Court may sit in departments and in Bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions hereinafter contained in relation to the Court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the Court to be heard and decided by the Court in Bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a case to be heard in Bank. If the order be

not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may convene the Court in Bank at any time, and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the Court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the Court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

SUPREME COURT COMMISSIONERS.

[Statutes 1903, page 178.]

SECTION 1. The Supreme Court of the State of California shall, immediately upon the expiration of the term of office of the present Supreme Court Commissioners, appoint five persons of legal learning and personal worth as Commissioners of said Court. It shall be the duty of said Commissioners, under such rules and regulations as said Court may adopt, to assist in the performance of its duties, and in the disposition of the numerous causes now pending in said Court undetermined. The said Commissioners shall hold office for the term of two years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of said Court, payable at the same time and in the same manner. Before entering upon the discharge of their duties they shall each take an oath to support the Constitution of the United States and the Constitution of the State of California, and to faithfully discharge the duties of the office of Commissioner of the Supreme Court to the best of their ability. The said Court shall have power to remove any and all members of said Commission at any time, by an order entered on the minutes of said Court, and all vacancies in said Commission shall be filled in like manner.

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UNITED STATES.

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

[Crim. No. 1111. In Bank.—September 27, 1904.]

THE PEOPLE, Respondent, v. SING YOW, Appellant.

CRIMINAL LAW—CONVICTION FOR MURDER—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION.—After conviction of a defendant for murder, affidavits upon motion for a new trial for newly discovered evidence, in conflict with that given on the trial, and directed to the impeachment of witnesses who had testified at the trial, were addressed to the sound legal discretion of the trial court; and where it is not clear that such evidence, if received, would or should have changed the result, the discretion of the court in denying the motion will not be disturbed.

ID.—COUNTER-AFFIDAVITS.—Upon such motion for new trial it was proper for the court to receive counter-affidavits to enable it properly and intelligently to exercise its discretion in passing upon the motion, and to determine whether a new trial would promote justice or result, with reasonable probability, in a different judgment.

ID.—CHARGE OF INTERPRETERS—INSUFFICIENT AFFIDAVIT.—An affidavit by defendant's attorney that the interpreter who officiated at the trial of the defendant was relieved upon the trial of another defendant, but which does not show that the interpreter was not in fact competent, is insufficient.

ID.—MISCONDUCT OF DISTRICT ATTORNEY.—It must be a very exceptional case in which a reversal will be ordered by reason of the character of the opening statement of the district attorney; and where such statement was warranted by the evidence, and where there is nothing of such gravity or importance in his cross-examination of the witnesses as to warrant a reversal, and the court carefully instructed the jury to disregard a statement by him in response to the query of the court as to the object of a question asked on cross-examination, there is no misconduct prejudicially affecting defendant's cause.

ID.—EVIDENCE—DECLARATION OF CONFEDERATE—RES GESTA.—Where there is evidence that the defendant and five other Chinese, all

armed, who co-operated in the killing of the deceased, were standing in front of a house out of which the deceased was to come, evidence is admissible to show, as part of the transaction, a declaration by one of the confederates, then made, that "if Jeong Him [deceased] comes out of the house, we will shoot at him," which was followed by his death from shooting by the confederates when he came out a few moments later.

ID.—INSTRUCTIONS—IDENTITY OF DEFENDANT—MODIFICATION OF REQUESTED INSTRUCTION NOT PREJUDICIAL.—A requested instruction as to the identity of the defendant, from which the court struck out a statement that the jury were not bound to believe that the witnesses were able to identify the defendant with certainty, because they swore positively to his identity, was not modified prejudicially where the jury were instructed that to justify a conviction of the defendant his identity must be proved beyond reasonable doubt, and that if there was a reasonable doubt as to the ability of the witnesses to identify him as the guilty person, they should acquit him.

ID.—REFUSAL OF REQUESTED INSTRUCTIONS OTHERWISE GIVEN.—It is not error to refuse requested instructions which were fully and fairly covered by other instructions given by the court.

ID.—JUDGMENT-ROLL—BILL OF EXCEPTIONS—INSTRUCTIONS—AFFIDAVITS.—Where the instructions given and refused are certified in the manner required by law they constitute a part of the judgment-roll, and should not be incorporated in the bill of exceptions; but affidavits presented on a motion for a new trial and the minutes of the proceedings had upon such motion should appear only in the bill of exceptions, and the clerk cannot make them a part of the judgment-roll.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order denying a new trial. E. C. Hart, Judge.

The facts are stated in the opinion of the court.

Hiram W. Johnson, for Appellant.

U. S. Webb, Attorney-General, and C. N. Post, Assistant Attorney-General, for Respondent.

ANGELLOTTI, J.—The defendant and four others were jointly informed against in the superior court of Sacramento County for the murder of one Jeong Him, and upon a separate trial he was convicted of murder in the first degree and adjudged to suffer death. He appeals from the judgment and from an order denying his motion for a new trial.

1. The principal point made upon this appeal is as to the action of the trial court in refusing to grant defendant's motion for a new trial on the ground of newly discovered evidence.

The evidence on the part of the prosecution on the trial of the case was to the effect that the defendant and five other Chinese were waiting for the deceased outside of a house in Walnut Grove, Sacramento County; that when he came out to the street three of these men each fired a shot at him, and the deceased taking to flight, the three others, of whom defendant was one, pursued him for some distance to a stable, and that each of the three fired pistol-shots at him. The deceased was found at this place dead, with some seven gunshot wounds in his body. There was ample testimony on the part of white witnesses to warrant the conclusion that the deceased was pursued by three armed Chinese to the stable, where several shots were fired. Several Chinese testified as to the identity of the six Chinese charged to have been concerned in the perpetration of the crime.

On the part of the defendant it was claimed that he was not in Walnut Grove at the time of the shooting, but was several miles therefrom, and that two other Chinese, whose names were not given, did the pursuing and shooting, and testimony to this effect was given.

Upon the motion for a new trial, to support the claim for a new trial on the ground of newly discovered evidence, there were filed the affidavits of two Chinese, each of whom stated that he witnessed the homicide, that defendant had nothing to do with it, and that it was committed by two men named Young Lung and Yee Jim.

The other affidavits filed by defendant, except those directed to showing due diligence, were directed entirely to the impeachment of certain witnesses who had testified on the trial. The object of the affidavits of three police-officers of Fresno and one Chinese was to show that Lee Bin, who had testified that he witnessed the pursuit and killing of the deceased by the defendant and two others, was at the time thereof in the city of Fresno, and that of the other affidavits, all of which were made by Chinese, was to show that three of the defendants jointly charged with this defendant, and identified as having been present and having participated in the crime,

by witnesses for the prosecution, were not in fact present thereat, but at the time thereof were elsewhere. Six of these affidavits were filed, two as to each of said defendants.

Assuming the showing as to diligence to have been sufficient, it is very clear to us that even if no counter-affidavits had been filed the ruling of the trial court in refusing to grant the motion for a new trial on account of newly discovered evidence could not be disturbed. It has been repeatedly said by this court that a motion for a new trial on this ground is addressed to the sound legal discretion of the trial court, and that the action of that court will not be disturbed, except in an instance manifesting a clear abuse of such discretion. A defendant is not entitled to a new trial as a matter of right simply because he has discovered new evidence which might have been admitted on the trial, if discovered earlier. The question always exists in this connection as to whether under all the circumstances of the case the newly discovered evidence is produced in such a way, and is of such a nature, that its introduction upon another trial would render a different result reasonably probable, and as to whether, in the absence of such evidence, the defendant has had a fair trial on the merits.

The law does not contemplate the granting of a new trial on this ground simply to enable the defendant to go through the form of another trial, where there is no reasonable probability that the newly discovered evidence will change the result, and where it does not appear that by reason of such evidence the result ought to be different.

The question as to the effect upon the case of the newly discovered evidence is from its nature peculiarly one that is addressed to the discretion of the trial court, and, of course, should be determined by that court with a full realization of the responsibility involved, and the motion should undoubtedly be granted where the showing is such as to make it apparent to the trial court that the defendant has, without fault on his part, not had a fair trial on the merits, and that by reason of the newly discovered evidence the result would probably be, or should be, different on a retrial. But unless the appellate court can plainly see that this discretion has been abused, that the showing made was of such a character as to make it manifest that the case would or should result

differently on a new trial, in view of the newly discovered evidence, the order of the trial court refusing a new trial will not be disturbed. (*Oberlander v. Fixen & Co.*, 129 Cal. 690, 692. See, also, *People v. Demasters*, 109 Cal. 607; *People v. Buckley*, 143 Cal. 375.)

The showing made by the affidavits presented on behalf of defendant was not such as to warrant us in holding that the trial court abused the discretion confided to it in this matter. In view of the evidence given on the trial, the trial court was amply warranted in concluding that the showing made by the affidavits of the two Chinese who deposed that they witnessed the homicide and that defendant was not a party, and the affidavits of the six Chinese who deposed, in couplets, as to the presence at places away from the scene of the homicide of three of this defendant's co-defendants, was not such as to indicate that a new trial ought to be granted that their evidence might be obtained, or that the introduction of such evidence would make a different result reasonably probable. The same may be said as to the affidavits relating to the witness Lee Bin. The affidavits of the three white witnesses are not inconsistent with the testimony given on the trial as to the presence of Lee Bin in Walnut Grove at the time of the homicide, and showed at most some conflict as to precisely how long before the homicide he had left Fresno.

It is urged, however, that the rule as to the discretion of the trial court cannot be invoked in this case, for the reason that the trial court, over the objection of defendant, erroneously allowed the prosecution to present counter-affidavits on the motion for new trial as to certain of the facts proposed to be shown by the newly discovered witnesses. The counter-affidavits of certain white and Chinese witnesses to the effect that Lee Bin did leave Fresno early in November, and others contradicting the allegations of defendant's affidavits as to the whereabouts of two of the co-defendants, were received over the objection of defendant, and, presumably, considered by the court in deciding the motion.

We are of the opinion that the court did not err in receiving these affidavits, or in taking them into consideration in determining the question as to whether a new trial should be granted. To hold otherwise would be to make it necessary for the trial court in many cases to grant a new trial upon

the *ex parte* affidavits of perjured witnesses, where it is easily within the power of the other side to demonstrate that the new witnesses are utterly unworthy of credit, and that the allegations of their affidavits are entirely without foundation, and can be overwhelmingly overcome by the evidence of reputable persons. In such a case it would be manifest that the interests of justice did not demand a new trial, that no substantial right of the defendant had been impaired by his failure to produce the evidence on the trial, and that there was no reasonable probability of a different result by reason of such newly discovered evidence.

As has already been shown, it is well settled in this state that it is for the trial court to determine whether or not the newly discovered evidence is of such a character as to make it reasonably probable that it would produce a different result on another trial, and in the determination of that question we can conceive of no good reason why the trial court should be limited to a consideration of the affidavits offered by defendant and the record of the trial. Such certainly has not been the practice in this state. In *People v. Fice*, 97 Cal. 459, the record shows that the counter-affidavits were entirely devoted to a contradiction of the alleged facts proposed to be proved by the newly discovered witnesses, and this court said: "Upon the ground of newly discovered evidence it is sufficient to say that the affidavits offered in support thereof were fully contradicted by counter-affidavits on the part of the prosecution, and for that reason the court below exercised a proper discretion in refusing to grant the motion." (See also, *Thompson v. Thompson*, 88 Cal. 110; *People v. Mesa*, 93 Cal. 580; *Merk v. Gelzhaeuser*, 50 Cal. 631; *Doyle v. Sturla*, 38 Cal. 456.) It has been held in many cases in other states that it is entirely competent to show by counter-affidavits on motion for new trial that a newly discovered witness is unworthy of credit. (*Williams v. Johnson*, 18 Johns. 488; *Parker v. Hardy*, 24 Pick. 246; *Pomeroy v. Columbia Ins. Co.*, 2 Caines, 260; *Erskine v. Duffy*, 76 Ga. 603; *Greenleaf v. Grounder*, 84 Me. 50; *Moore v. State*, 96 Tenn. 209; 1 *Graham and Waterman on New Trials*, *p. 485.) In other cases, counter-affidavits as to the alleged facts to be testified to by new witnesses were allowed. (*Coast Line R. R. Co. v. Boston*, 83 Ga. 387; *Harmon v. Charleston etc. Ry. Co.*, 88 Ga. 261;

Harris v. Rupel, 14 Ind. 209; *Searcy v. Martin-Woods Co.*, 93 Iowa, 420; *Ames v. Howard*, 1 Sum. 482; *Lorig v. Davenport*, 99 Iowa, 479; *Finch v. Green*, 16 Minn. 355; *State v. Burd*, 115 Mo. 405; *Burlingame v. Cowee*, 16 R. I. 40; *Dignowitty v. State*, 17 Tex. 521; *Nicholas v. Commonwealth*, 91 Va. 741; *Holland v. Huston*, 20 Mont. 84; *Hammond etc. Ry. Co. v. Spyzchalski*, 17 Ind. App. 7, 16.

In a note, in volume 14 of the Encyclopedia of Pleading and Practice, page 913, it is said that it is uniformly held that on the hearing of such a motion the court may examine counter-affidavits to determine whether a new trial would promote justice or result in a different judgment.

It is true that a different rule has been laid down in Illinois, and that rulings excluding counter-affidavits have been made in one or two other jurisdictions, but the great weight of authority is to the effect that the court may consider counter-affidavits for the purpose of determining whether the interests of justice demand a new trial, and as to whether there is a reasonable probability that a new trial will by reason of such newly discovered evidence result differently.

The argument of those claiming otherwise is, that the unsuccessful party should have the opportunity of presenting the newly discovered evidence to another jury, whose exclusive province it would be to determine as to the credibility of the witnesses and the facts established by the testimony. But this argument loses sight of the object of the law relative to the granting of a new trial on account of newly discovered evidence, which is to allow a new trial where it is made to appear that the newly discovered evidence is of such a character that it cannot be said that the unsuccessful party has, in the absence thereof, had a fair trial on the real merits. This question is addressed to the trial court alone. In *Finch v. Green*, 16 Minn. 355, the supreme court of Minnesota said: "The application, which is addressed to the sound discretion of the court, is based upon the ground that there has not been a fair trial upon the real merits, and for this reason it is proposed to compel a party who has once litigated the matter in controversy to litigate it a second time. Why should not such a party be permitted to produce counter-affidavits for the purpose of showing that the alleged ground for a new trial has no existence? We think no good reason can be given

why he should be concluded by the *ex parte* affidavits of the moving party. . . . We see no warrant for saying that the court below, upon comparing the affidavits and counter-affidavits with reference to the question whether a new trial would be likely to produce any different result from the first, erred in refusing the application."

Such counter-affidavits are received and considered, as has been said by some courts, simply for the purpose of enabling the trial court to intelligently exercise the discretionary power confided to it of determining whether or not the interests of justice demand that a new trial should be had.

There is no decision of this court forbidding the practice of presenting counter-affidavits. On the contrary, such practice has been fully recognized by the court as proper, for orders denying new trials have been affirmed on the ground that the showing made by the counter-affidavits justified such orders. Defendant relies entirely upon some expressions contained in a concurring opinion in *Shafer v. Willis*, 124 Cal. 41. While that opinion is entitled to the greatest respect, it is not a decision of the court, and we are of the opinion that, in so far as it may be in conflict with what has here been said, it is contrary to our recognized practice and to the great weight of authority.

2. An affidavit was presented, made by defendant's attorney, setting forth certain proceedings upon the trial of another defendant, which occurred subsequent to defendant's trial, as to a change in interpreters, the result of which was, that the Chinese interpreter who had officiated on the defendant's trial and for a portion of the other trial was relieved by the court, and another interpreter substituted, the claim of the defendant being, that it was then made to appear that the interpreter who had officiated on his trial was not competent to interpret properly. We have carefully examined this affidavit, and assuming, for the purposes of this case only, that the question as to such competency is reviewable here, find nothing therein to warrant us in holding that the interpreter was not in fact competent.

3. It is urged that the district attorney was guilty of misconduct on the trial. A consideration of the points made in support of this contention discloses no misconduct prejudicially affecting defendant's cause.

It must be a very exceptional case in which a reversal will be ordered by reason of the character of the opening statement of the prosecuting officer, and in this case the statement of the district attorney to the effect that he would show that the six Chinese met in front of the house in which the deceased was, in accordance with a preconceived purpose to kill him, was amply warranted by the evidence subsequently introduced as to the circumstances of the homicide.

In the cross-examination of witnesses Brown and Fitzgerald we find nothing of such gravity or importance as to warrant a new trial. There is nothing in the cross-examination of the witness Wise to call for notice, and the jury were very fully and carefully instructed by the court that they must disregard the statement made by the district attorney, in response to a query of the court, as to the object of a question asked by him of the witness Lin Tai, in cross-examination.

4. It is contended that the court erred in certain rulings as to the admissibility of testimony.

The evidence as to the statement made by defendant Ow Sing Dock immediately prior to the homicide, while the six Chinese were standing in front of the house apparently waiting for the deceased to come out, was admissible. As testified by Ah Hing, that statement was, "If Jeong Him comes out of the house, we will shoot at him." It was made in the presence and hearing of the five other armed Chinese, who, as the testimony for the prosecution indicated, had assembled there with him, for the purpose of killing, and who, with him, actually killed the deceased, upon his coming out a few moments later, and was practically a part of the transaction itself.

There is nothing in any of the other points made that requires notice.

5. Complaint is made that the court erroneously refused certain instructions requested by the defendant, and erroneously modified one such instruction. The modified instruction was one relating to the question of identity, and the court struck out therefrom a statement to the effect that the jury were not bound to believe that the witnesses were able to identify the defendant with certainty because they swore positively to his identity. The jury were instructed that to justify a conviction of the defendant his identity as the guilty person must be proved beyond all reasonable doubt, and that if there

was a reasonable doubt as to whether the witnesses were able to identify the defendant as the guilty person they should acquit him. They were further instructed that it was their exclusive province to judge of the credibility of the witnesses and the degree of weight and credit to be given to the testimony of each witness. Defendant could not have been prejudiced by the modification, in the respect stated, of his requested instruction. The requested instructions refused were fully and fairly covered by other instructions given by the court.

We can find nothing in the record that would warrant a reversal.

In view of the fact that the instructions given and refused, and the affidavits on motion for a new trial appear twice in the transcript, once in what purports to be the judgment-roll and once in the bill of exceptions, thereby enlarging the transcript by nearly one hundred and twenty pages, it is proper to suggest that no possible good can be accomplished by such a repetition, except in so far as the increase of the cost of printing may be considered an advantage.

Where the instructions given and refused are certified in the manner provided by law they constitute a part of the judgment-roll, and should not be reproduced in the bill of exceptions. On the other hand, affidavits presented on a motion for a new trial and the minutes of the proceedings had on such a motion constitute no part of the judgment-roll (Pen. Code, sec. 1207), and the clerk cannot make them a part thereof, and they should appear only in the bill of exceptions.

The judgment and order are affirmed.

Shaw, J., McFarland, J., Van Dyke, J., Lorigan, J., Henshaw, J., and Beatty, C. J., concurred.

[S. F. No. 3112. Department Two.—September 25, 1904.]

ALF PENNINGTON, Respondent, v. F. L. CAUGHEY,
Appellant.

ASSAULT AND BATTERY—DAMAGES—SUFFICIENCY OF COMPLAINT.—A complaint for assault and battery which alleges that the defendant assaulted the plaintiff and kicked him in the face and on the body,

and that he "thereby seriously wounded and bruised the plaintiff, to his damage" in a specified sum, is to be construed as importing that by reason of the acts complained of the plaintiff sustained damage to that amount, and is sufficient as to the damages.

APPEAL from a judgment of the Superior Court of Mendocino County. J. M. Mannon, Judge.

The facts are stated in the opinion.

George A. Sturtevant, for Appellant.

T. L. Carothers, for Respondent.

SMITH, C.—The defendant appeals from a judgment against him in favor of the plaintiff, in a suit for assault and battery, for one hundred dollars. There was a demurrer to the complaint, which was overruled, and the only point made by the appellant is the alleged insufficiency of the latter; as to which it is claimed that there is no allegation in the complaint that "the respondent has sustained damages." But it is alleged in the complaint not only that the defendant assaulted the plaintiff and knocked him down, and kicked him in the face and on the body, but that he "thereby seriously wounded and bruised the plaintiff and rendered him sick, sore, and lame, to his damage in the sum of \$5,000." This is but to say, in language technically defined by long use, that by reason of the acts complained of the plaintiff suffered damage in, or sustained damage to, the amount of five thousand dollars. (Stephen on Pleadings, 33 et seq., 38; *Baker v. Hope*, 49 Cal. 598.) Nor can the language used be otherwise construed. The complaint is entirely sufficient. (*Childers v. Mercury etc. Co.*, 105 Cal. 289; ¹*Hearne v. De Young*, 132 Cal. 360.)

We advise that the judgment appealed from be affirmed.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

McFarland, J., Lorigan, J., Henshaw, J.

¹ 45 Am. St. Rep. 40.

[Sac. No. 1024. In Bank.—September 28, 1904.]

G. W. DWINNELL, Respondent, v. W. F. DYER et al.,
Appellants.

MINING CLAIM — LOCATION — EFFECT OF STATE LAW — VALID LOCAL RULES.—The state law of March 27, 1897, respecting the contents of location notices, and the record thereof within limited periods, was valid as being a local regulation authorized by the act of Congress, and so long as it was unrepealed was obligatory upon locators of mining claims in this state. But if the Revised Statutes were otherwise complied with, a compliance with the state law might be had at any time while the statute was in force, if there were no intervening rights.

Id.—VOID TECHNICAL LOCATION.—A mere technical location of a mining claim during the existence of the state law, without compliance therewith, and without any attempt to work or develop the claim, in compliance with the Revised Statutes, is wholly invalid, and a deed thereof conveys no title.

Id.—EFFECT OF REPEAL UPON LOCATION OTHERWISE VALID—ACTUAL POSSESSION TO BOUNDARIES—SUBSEQUENT LOCATION.—The repeal of the state law had the effect thereafter to dispense with its requirements, and work thereafter done under a prior location otherwise valid, and properly maintained under the Revised Statutes, had reference to the boundaries marked in accordance therewith, and constituted actual possession of the claim to the extent of those boundaries, which precluded a valid conflict therewith under a subsequent location.

Id.—ACTION TO QUIET TITLE—FINDINGS AGAINST EVIDENCE—INCONSISTENCY—DECISION AGAINST LAW.—Where the defendants in an action to quiet title claimed under a location of mining ground made while the state law was in force, but which was perfected by actual possession and work under the Revised Statutes after repeal of the state law, and plaintiff claimed under a subsequent location, *held*, that findings that the mining ground possessed by the defendants was public mineral land of the United States when plaintiff made his location, and that his location conflicting with defendants' claim was valid, are against the evidence, inconsistent with other specific findings and with certain averments of the complaint, and also that the decision is against law, in failing to find upon the material issue whether defendants' location was not perfected as a good claim prior to plaintiff's location.

Id.—CASE DISTINGUISHED.—The case of *Belk v. Meagher*, 104 U. S. 270, distinguished, and held not to be controlling authority in support of the decision in favor of plaintiff's location.

APPEAL from a judgment of the Superior Court of Siskiyou County and from an order denying a new trial. J. S. Beard, Judge.

The facts are stated in the opinion of the court.

Gillis & Tapscott, for Appellants.

R. S. Taylor, for Respondent.

BEATTY, C. J.—Action to quiet title to a mining claim. In his complaint, filed November 30, 1900, the plaintiff alleged among other things that he was, and for a long time had been, the owner, entitled to the possession, and in the exclusive possession, of a quartz-lode mining claim, known as the Cuban Beauty No. 2; that on the 15th of November, 1900, the defendants had entered upon the claim with force and arms and had driven off the men employed by him to do the necessary assessment-work for that year; that they had taken possession of the ground, claimed to own it, and were excavating and removing the gold-bearing quartz, etc. Wherefore he prayed for a temporary injunction and for a final decree adjudging him to be the owner, etc. By their answer the defendants alleged that W. F. Dyer was the owner of a mining claim located in 1898 as the Squaw Creek No. 2, a small portion of which was included within the alleged boundaries of Cuban Beauty No. 2, and they denied that they had excluded plaintiff from any portion of his claim except that which overlapped the superior claim of W. F. Dyer. As to that portion, they admitted in effect that they were holding it and mining and removing the ores contained therein. From this brief statement it will sufficiently appear that the only material issues presented by the pleadings were those relating to the validity and priority of the overlapping claims. Upon these issues the findings and decision of the superior court were in favor of the plaintiff, and the defendants appeal from the judgment and from an order denying them a new trial.

From the evidence contained in the record it appears that both parties relied, to some extent at least, upon locations made or attempted in 1898, all of which were held invalid for failure of the locators to comply with some of the requirements of an act of the legislature of California, passed March 27,

1897, prescribing the manner of making mining locations, etc. (Stats. 1897, p. 214.) These locations being held void, the decision of the superior court in favor of the plaintiff was based wholly upon a relocation of the Cuban Beauty No. 2, made November 26, 1900, by the plaintiff, just four days before he commenced this action.

In view of the grounds of the motion for a new trial,—i. e. failure of the evidence to sustain the findings, and that the decision is against law,—it will facilitate the discussion to quote some of the more specific findings in full. They are as follows:—

“I.

“That upon the 26th day of November, 1900, plaintiff, a citizen of the United States over the age of twenty-one years, located as a mining claim a certain parcel of land situated in Gazelle Mining District, county of Siskiyou, state of California, and described as commencing at a point where location notice was posted, thence westerly along the line of the Cuban Beauty Quartz Mine a distance of 300 feet to stake in mound of rock; then southerly a distance of 1500 feet to stake in mound of rock; thence easterly 600 feet to stake in mound of rock; thence in a northerly direction 1500 feet to the south-east corner of the Cuban Beauty Quartz Mine, to stake in mound of rock; thence along the line of said Cuban Beauty Quartz Mine to place of beginning, and commonly known as the Cuban Beauty No. 2.

“That at the time plaintiff made mining location, said land was unoccupied public mineral land of the United States, and subject to location as such.

“II.

“That in making said location plaintiff complied with the laws of the United States by placing markings at the exterior boundaries of said location so that the same could be readily traced, and also complied with all local custom and usages in recording notice of said location.

“III.

“That prior to said location by plaintiff one Grant Davis had attempted to locate the same land covered by the said location of plaintiff herein, and thereafter sold and conveyed said land to this plaintiff by deed.

"IV.

"That prior to said location by plaintiff, defendant W. F. Dyer and Frank Phillips had attempted to make locations of certain quartz mining ground in Gazelle Mining District, and known as Squaw Creek Gold Mine No. 1, Squaw Creek Gold Mine No. 2, and Squaw Creek Gold Mine No. 3. That said Squaw Creek Gold Mine No. 2 covers a portion of the same ground covered by the location of the plaintiff herein.

"V.

"That the said attempted locations made by said Grant Davis and by said defendant W. F. Dyer and said Frank Phillips were not made in compliance with the law then in force when the same was made.

"VI.

"That upon or about the 15th day of November, 1900, plaintiff sent workmen upon said claim for the purpose of doing assessment work thereon, and upon said day defendants wrongfully and with force and arms, entered upon said land of plaintiff and drove off said workmen and threatened to drive them off if they ever returned, and at the time of the commencement of this action still hold possession thereof, and threaten to continue to hold possession."

These findings, when read in connection with the evidence in the case, fully disclose the erroneous view of the law which guided the decision of the superior court. The attempted location of the Squaw Creek claims by Dyer and Phillips was in September, 1898, and the evidence shows without substantial conflict that they then did everything necessary to constitute a valid location of the ground under the laws of the United States; that is to say, they discovered a lode of gold-bearing quartz, they posted on the ground a notice claiming fifteen hundred feet along the supposed course of the vein and three hundred feet on either side, they plainly marked the exterior lines of their claim, including the point of discovery, and shortly afterwards commenced the work of development, which they prosecuted with more than sufficient diligence. In addition to this Dyer, who had acquired the interest of his locator, Phillips, built a house on the claim and was residing there within his marked boundaries at the time when plaintiff's employees came on the ground, November 15, 1900, for

the purpose of doing assessment work for the Grant Davis location of Cuban Beauty No. 2, and also when plaintiff made the location on November 26, 1900, which the court finds to have been a valid location of unoccupied mining ground, and upon which alone his right of recovery is made to depend. The attempted location of the Cuban Beauty No. 2 by Grant Davis was made in October, 1898, a month later than the discovery and attempted location of the lode by Dyer, and the acts done by Davis—giving the utmost credit to his testimony—fell far short of the efforts of Dyer to comply with the law. His evidence leaves it very doubtful if he ever discovered any gold-bearing rock in place or did anything except to mark the boundaries of his claim. The court finds that his claim as marked was the same as the location made by plaintiff November 26, 1900, and there is evidence that this claim at its extreme southern end includes some croppings of a lode, which appears to be the same as that upon which Dyer has done a large amount of work. But this finding that plaintiff's location embraces the identical ground covered by the Grant Davis claim is sustained by no testimony aside from that of Davis, and his testimony on the stand is in direct conflict with statements he admits having made when on the ground with Dyer and others for the purpose of adjusting their lodes so as to avoid a conflict of locations. At that time he stated that his southwest corner was where he now claims his southeast corner was placed, and the change he thus makes involves a swinging of the southern end of his claim six hundred feet to the west, making it by that means alone cover a triangular portion of Dyer's claim, including the only rock in place which could have been the basis of a valid location. He, however, says that his statement on the ground was a mistake, and the trial judge accepted his explanation, as he had a right to do, and as we should perhaps be bound to do if the fact were material, which, as will appear, we do not deem it to be so far as the present appeal is concerned. In view, however, of the necessity for a new trial, and the possible materiality of this fact in some different aspect of the case, it may properly be suggested that an accurate instrumental survey of this original claim in connection with the lines of the older claims—the Cuban Beauty and Dewey, with reference to which the Cuban Beauty No. 2 was located, and the subsequently located

claims of Chadwick and the Black Bear No. 2, located with reference to the Cuban Beauty, the Dewey, and Cuban Beauty No. 2—would probably show whether the testimony of Grant Davis, in addition to being inconsistent with his former statements, does not also involve a geometric absurdity; that is to say, whether it does not require us to believe that by going south on the west side of a claim bounded by parallel lines we will reach the southeast instead of the southwest corner. But assuming for the present purpose that the plaintiff's location of November 26, 1900, covered the identical ground included by the boundaries marked by Grant Davis in October, 1898, there is no evidence that either Davis or the plaintiff ever did, or attempted to do, any development work within those boundaries prior to the 15th of November, 1900, when plaintiff's men found Dyer in possession and were driven off the ground by him and his employees, Dyer having in the mean time, as above stated, built a cabin on the ground, taken up his residence there, and continued work upon the vein. But the whole question as to what, if any, effect the Grant Davis location may have had upon the rights of the parties is eliminated from the case as presented on this appeal by the finding of the court—amply sustained by the evidence, even if the respondent could question it—that his attempted location was invalid for want of conformity to the requirements of the law then in force.

The law to which this finding (No. V) refers was the above-cited act of March 27, 1897, prescribing certain particulars that location notices must contain, and requiring the record of such notices within certain limited periods. This state law was no doubt valid as one of the local regulations authorized and sanctioned by the act of Congress, and so long as it remained unrepealed was obligatory upon those who desired to secure mining claims in this state by the constructive possession resulting from a technical compliance with the law. The superior court, therefore, was right in concluding that neither the Davis location nor the Dyer location was valid at the time it was made. But the act of 1897 was repealed long before the plaintiff made his location in November, 1900. In the first place, an act properly entitled was passed March 20, 1899, (Stats. 1899, p. 148,) for the purpose of repealing it, but owing to a faulty wording of the body of

the act there seems to have been a question whether it effected the desired repeal. In consequence of this uncertainty the same act properly worded was introduced at the extra session of the legislature in 1900, and finally passed February 8th of that year, taking immediate effect. (Stats. 1900, p. 9.) The result of this repeal was to make the validity of mining locations in this state solely dependent from that time forward upon a compliance with the laws of the United States and such valid local regulations as the miners themselves may have adopted in their respective districts. There is no evidence of an organized district including these claims, and no suggestion of a failure to comply with any miners' rules or customs. So that the point to be considered is the effect upon the Davis and Dyer locations of the entire elimination from our state or local laws of all regulations additional or supplemental to the laws of the United States governing the location of mining claims. The repeal of the state law took effect at least as early as February 8, 1900, if not on the 20th of March, 1899, and the condition in which it found the Davis and Dyer claims was this: Davis had never attempted anything except a technical location, and in that he had failed. Dyer had also failed in his earlier attempt at a technical location, but he was on the ground working the vein within his marked boundaries, and had done everything necessary to constitute a valid location under the only law then and thereafter in force. This being so, his claim was thenceforward good so long as he continued to do the necessary assessment-work. This work, and far more than necessary to satisfy the requirements of the act of Congress, was clearly proved without any substantial conflict in the evidence, and therefore the concluding portion of the first finding, to the effect that on November 26, 1900, plaintiff's mining location was made upon *unoccupied* mineral land of the United States, is unsustained by the evidence. This finding is apparently based upon the view that the Dyer location having been originally defective by reason solely of noncompliance with the state law—although fully complying with the laws of the United States—acquired no validity by the repeal of the state law. But this is not a correct view. The repeal of the state law of course had no *affirmative* effect in giving validity to the location, but it did away forever with the necessity of conforming

to its provisions and left unimpaired and unaffected every right which is conferred by a compliance with the provisions of the Revised Statutes of the United States. Dyer, having complied with those provisions, was certainly in no worse a situation with respect to this ground than the plaintiff. He had discovered the ledge once,—he could not discover it again. He had marked the boundaries of his claim,—there was nothing to be gained by marking again boundaries that were already marked. The laws of the United States require no posting or recording of notices, but merely provide that a notice when required by local regulations must contain certain things in order to be of any effect. There was no longer any law providing for notice or record or giving any effect to a recorded notice, and all that Dyer could do was to perform the amount of development-work required by the law of Congress, and that he was doing when this action was commenced and injunction issued more than a month prior to the expiration of the year allowed to him for that purpose. Upon these facts we cannot understand how it could be held that at the time of plaintiff's attempted location the ground was unoccupied. Dyer had in fact a *pedis possessio* to the extent of his visible boundaries, and the fact that those boundaries had been marked in connection with an attempted location invalid only because of failure to comply in other particulars with the state statute of 1897—then no longer in force—made them none the less efficacious for his protection. (*Conway v. Hart*, 129 Cal. 483, 484.) The working of a quartz lode inside of defined boundaries is not only a *pedis possessio* of all the ground within such boundaries, but is in itself the substance of everything required by law to constitute a valid location, and ever since the decision of this court in *English v. Johnson*, 17 Cal. 107,¹ it has been held to give a good title to a mining claim (not excessive in extent) regardless of local rules providing for the posting and recording of notices. It is actual possession, while a formal location is only constructive possession. In addition to the cases of *English v. Johnson* and *Conway v. Hart*, above cited from the decisions of this court, we refer for a fuller statement and elucidation of the views here expressed as to the location of mining claims since the act of Congress of May 10, 1872, to the following cases: *Golden*

¹ 76 Am. Dec. 574.

Fleece Co. v. Cable Consolidated Co., 12 Nev. 312; *Gleeson v. Martin White Co.*, 13 Nev. 442; *North Noonday Co. v. Orient Co.*, 1 Fed. 522; *Jupiter Co. v. Bodie Mining Co.*, 11 Fed. 666.

The Nevada cases were among the first that arose under the act of Congress of May, 1872, and the views therein expressed were substantially embodied in the charge to the jury given by Judge Sawyer in the two cases cited from the Federal Reporter. The decisions of Judge Sawyer have been cited and followed in numerous subsequent cases in the federal and state courts, and we are not aware that they have ever been seriously questioned.

It is proper here to notice the case of *Belk v. Meagher*, 104 U. S. 279, which in the Department opinion affirming the judgment and order of the superior court was cited as a controlling authority. It will not be difficult, we think, to point out a distinction between that case and this, which makes it totally inapplicable to the point to be decided here. In that case, Belk, in December, 1876, posted a notice of location upon mining ground then covered by a valid claim of third parties who by their acts done in compliance with the law of the United States had become invested, according to its express terms, with the "exclusive right of possession" of the ground so located until the first of January, 1877. If by that date they did not resume work on the claim their right of possession would lapse, but in the mean time it was unquestionable, and when Belk attempted his location he not only posted his notice upon ground not open to location, but he was guilty of an unlawful act—a trespass upon the lawful possession of others. A careful reading of Chief Justice Waite's opinion will show that for this reason alone his acts done in December were held utterly void. In this case the acts of Dyer done while the act of 1897 was in force were every one of them lawful, and every one of them constituted a step taken in compliance with the law of Congress. His discovery was upon unoccupied land of the United States, his entry, his marking of boundaries, his work on the lode—everything he did—was free from any imputation of illegality, and when he had fully complied with the act of Congress there was nothing left for him to do except to post and record the notices as prescribed by the state law in order to

make his location perfect, and this he could have done at any time before the ground became subject to an intervening right. Under the law of Congress, under the law of this state, and under every code of district laws adopted by miners that has come to my notice, the prescribed order of the acts necessary to a valid location is, first, the discovery of mineral-bearing rock in place; second, the posting of notice at or near the point where the ledge is exposed; next, the recording of notice; next, the marking of boundaries; and finally the work of development. But although this is the proper and natural order of procedure it is not obligatory in the absence of intervening rights. It is indeed universally held that when every act necessary to complete a location has been done before an adverse claim has accrued, the order in which such acts have been performed is immaterial. If, for instance, a locator, before the discovery of any lode, begins by first marking out a surface claim, his location is perfected if he develops a lode within his boundaries, before a good location is made by an adverse claimant. So here, Dyer having done everything required by the act of Congress, could have perfected his claim under the state law, if it had remained in force, by a subsequent posting and recording of the prescribed notices.

To state the matter in another form: Several distinct acts are essential to constitute a valid location; the order in which they are performed is immaterial. Dyer performed all the acts required by the federal statute in a perfectly legal manner, and they were all valid—the acts to be performed under the state law had been omitted, but were still performable at his option without any infringement of intervening claims when the state released him in common with all others from compliance with its local law. His claim was then perfect. Belk, on the contrary, commenced his attempted location by an unlawful trespass upon the rights of others, which for that reason was totally invalid as the foundation of any right, and, excluding this unlawful act from consideration, it was held that his subsequent acts prior to Meagher's location were insufficient to secure the ground. Dyer's acts on the contrary,—none of which could be excluded from consideration on the ground of illegality,—did long prior to the 26th of November, 1900, constitute a perfect location as the law stood from and after the 6th of February of that year.

We have not overlooked the contention of respondent that it is found as a fact by the superior court (concluding portion of the first finding) that when plaintiff made his location on November 26, 1900, the ground was vacant and unoccupied, and his further contention that there is sufficient conflict and uncertainty in the evidence regarding the Dyer locations to sustain this finding in its broadest sense. We think, however, that such a finding would not only have been in conflict with all the substantial evidence in the case, but it would have been inconsistent with other and more specific findings and with the allegations of the complaint.

The allegation of the complaint is, that the ouster by defendants occurred on the 15th of November, 1900, and the evidence conforms strictly to this allegation. It shows that on that day two men employed by plaintiff to do assessment-work on his supposed claim were driven from the ground by Dyer and his men. At that date, then, when, according to the specific findings of the court, plaintiff had acquired no rights to any of the ground in controversy, the defendants were on the ground and remained in possession, claiming it under the location which the court finds they had long before *attempted* to make. It was eleven days later that the plaintiff's supposed right was initiated by his formal location of November 26th, and when four days later, on November 30th, he filed his complaint in this action, he alleged the ouster on the 15th, the taking possession and claim of ownership by defendants, and that they were excavating and threatening to continue excavating the gold-bearing rock. In short, the allegations of the complaint itself, on any fair construction of their terms, are inconsistent with the assumption that Dyer was not in possession of his claim at the date of plaintiff's location.

Finally, we think that a new trial should have been granted upon the ground that the decision is against law for want of a finding upon the most material issue presented by the pleadings. It is found that plaintiff made a location of the ground in November, 1900, and it is found that Dyer's previous location was invalid for lack of conformity to a law in force at the time it was made. This finding, however, is entirely consistent, as we have endeavored to show, with the supposition that after the repeal of the act of 1897 his location may have

been or become perfect, and the material question—the issue upon which the whole case depends—is not whether Dyer had a good claim in 1898 or 1899, but whether he had a good claim prior to November 26, 1900. Upon this point there is no direct finding, and if it be contended that it is indirectly or inferentially found against the defendant, we can only repeat that such finding is not only in conflict with the evidence, but inconsistent with the allegations of the complaint.

The judgment and order appealed from are reversed.

Shaw, J., Van Dyke, J., Lorigan, J., and Henshaw, J., concurred.

McFARLAND, J.—I dissent, and adhere to the opinion heretofore rendered in Department. I think that the judgment and order appealed from should be affirmed.

The following is the opinion rendered in Department Two on the 28th of April, 1904, adhered to in the dissenting opinion of Mr. Justice McFarland:—

CHIPMAN, C.—Plaintiff alleges ownership of a quartz mine called Cuban Beauty No. 2, situated in Siskiyou County; that defendants unlawfully entered upon plaintiff's said land with force and arms and drove off plaintiff's men there employed, and are excavating gold-bearing rock contained therein. It is prayed that defendants be enjoined from interfering with said mining property, and that plaintiff be adjudged to be the owner thereof.

Defendants Oscar Dyer and Charles Truesdale disclaimed all interest in the land in controversy. Defendant W. F. Dyer answered claiming ownership in certain three mining claims known as Squaw Creek Gold Mine No. 1 and No. 2 and No. 3. It is alleged that a portion of plaintiff's said claim overlaps a portion of Squaw Creek Gold Mines Nos. 2 and 3; ownership is claimed at the commencement of the action and some time prior thereto, and that defendant and his predecessor in interest have been in possession continuously since September 12, 1898, and since said date have been entitled to possession; denies plaintiff's ownership of any part of said overlapping ground; denies interference with plaintiff or claim of his said alleged claim, except as to said triangular piece.

The court found the facts for the plaintiff, and as conclusions of law found that plaintiff is the owner and entitled to have defendant restrained from interfering therewith. Judgment was accordingly entered, from which and from the order denying his motion for a new trial defendant appeals.

Certain errors of law occurring at the trial are specified by defendant, but as they are not noticed in his brief they will be deemed waived. Appellant's contention is, that the evidence does not sustain the findings in certain particulars, namely: 1. That at the time plaintiff made his location, November 26, 1900, the ground was unoccupied and subject to location, the contention of defendant being that he had long prior to that date made a valid location of ground including that in dispute; 2. Under like contention the finding is claimed as unsupported that plaintiff complied with law; 3. Also as unsupported, that one Grant Davis had attempted to locate the same land as that covered by plaintiff's location, and thereafter sold and conveyed the same to plaintiff, and this because the Davis location was in conflict with a prior location by defendant; that the Davis location did not include any ledge in place; that Davis had made no discovery of mineral in place within the lines of his location; 4. Also as unsupported, so far as concerns defendant, that the attempted early locations of Davis and of defendants Dyer and Phillips were not made in compliance with the law then in force—to wit, the act of March 27, 1897, of this state—defendant's contention being that his location was valid.

There is evidence that Davis made his location October 30, 1898, on which day he posted notice at the center of the north line of the claim bordering on the so-called Cuban Beauty. The lines were run out and corners marked. The notice was not recorded until September 8, 1899. The Cuban Beauty and the Dewey, both of which corner with the Cuban Beauty No. 2 at the northeast corner of the latter, were located at the same time by the Davis party and formed one group of mines. Davis subsequently also located the Black Bear No. 2, which lies south of and adjoining the Cuban Beauty and west of the Cuban Beauty No. 2, and joins it, but extends south less than half the length of the latter. He conveyed to plaintiff on November 27, 1899, by deed placed in escrow, which was delivered on compliance with the contract of sale in September,

1900. There is evidence, though not without conflict, that when these locations were made there was no other location or signs of any other location of the ground involved. On November 26, 1900, plaintiff relocated the Cuban Beauty No. 2 through one Cousins, who did the work. This location was intended to be, and was, substantially identical with the original Davis location. Cousins testified that Davis had previously shown him the lines and corners, and in January, 1900, defendant Oscar Dyer, in company with Davis, showed him some of the lines and corners. Speaking of the relocation in November, 1900, he testified: "At the time I located this claim I went all over it. As for mining work there was a small hole dug on it, in some small places it was picked a little. There wasn't a square yard of dirt or rock moved in any one place. I don't think it would amount to a cubic yard." When Oscar Dyer was with Cousins in January, 1900, he told Cousins that his brother (defendant) claimed the ground west of the southeast corner of the Davis claim, and that more than the assessment-work had been done. Cousins testified: "I then said that I had seen they had. But it wasn't on what we claimed—they hadn't hit a lick of work on what we claimed—north of our south line he had done a lot of work upon the hill and on the ground we didn't claim."

It appears from plaintiff's testimony that he relocated the Cuban Beauty No. 2, because of some doubt of the legality of the Davis location, under the State Mining Law of 1897, and his attempt to do the assessment-work was in order to hold the claim if the Davis location was legal. As to the relocation in 1900, the assessment-work becomes immaterial, as it might be done at any time during the year 1901, and the action was tried in August of that year. It also appeared from plaintiff's testimony that he acquired all the Davis group of claims, and the contract of sale calls for the payment of one hundred and twenty-five thousand dollars for all the mines. There were some others besides the three mentioned by plaintiff in his testimony following: "There were three claims—the Cuban Beauty, the Cuban Beauty No. 2 and the Admiral Dewey, and that work [the assessment-work for 1899] on the Admiral Dewey was supposed to develop the three claims, and was done for that purpose, and then I did the assessment-work for those three claims on the Admiral

Dewey. I spent about three thousand dollars on the Admiral Dewey for the time in doing it. I ran about 500 feet of tunnels and then I built some buildings and then I fixed the trail and general development of the mining claims." Allen Davis testified that he was working on the Dewey Mine about May 1, 1899, and met defendant William Dyer there at that time, and in a conversation Dyer, in reply to a question as to the line between sections 6 and 7, and as to whether his location extended into section 6, pointed out about where the section-line was, and stated: "I haven't got anything in 6, all of mine is in section 7." The south line of the Cuban Beauty No. 2 is admittedly a considerable distance north of this section-line,—"three or four hundred feet" as testified by witness Cousins. Dyer's claims did in fact extend on to section 6, and he probably meant no more in his statement to Cousins and those present, than that he claimed nothing within the lines of the Davis location of the Cuban Beauty No. 2. Dyer knew where the section-line was, and so testified. The court found that the Squaw Creek No. 2 included some of the ground embraced in the Cuban Beauty No. 2.

It is not necessary to discuss the validity of the original location by Davis, for the court found that it was not made in conformity with the state law (Stats. 1897, p. 214), and the finding cannot be questioned by plaintiff. (*Cowing v. Rogers*, 34 Cal. 648.) Nor do we think it necessary to examine the evidence particularly as to the validity of the Dyer locations, made about the same time, for they also failed to comply with the statute, and the court so found. Dyer subsequently posted a new notice January 14, 1899, recorded March 13, 1899. The statute above referred to was in force until February 28, 1899, when it was repealed. (Stats. 1899, p. 148.) Dyer claims under this location as well as his location in 1898. But we think the evidence fails to establish the validity of either location, while there is evidence showing the validity of plaintiff's location of November 26, 1900. As we understand the purpose of the evidence as to these early locations, it was not so much to show valid locations in fact as it was to show the intention of the locators as to the particular ground in question. Appellant's contention is, that he took all the ground south and west of a line drawn from the southeast corner of the Brown Bear claim to what is now claimed

by plaintiff to be the southeast corner of the Cuban Beauty No. 2; and as the Brown Bear claim lay west of the Cuban Beauty No. 2, and extended only about six hundred feet along the latter, the said line would cut off more than a third of the southwest portion of the Cuban Beauty No. 2, including the ledges and rock in place found on the latter by Davis, its original locator. This contention of appellant is based largely on evidence that Davis himself conceded this to be the dividing-line in February, 1890, when he and appellant and some other persons were on the ground for the purpose of ascertaining its location. It appeared, however, that when Davis took the party to what in fact was the southeast corner of his claim, he by mistake told them it was the southwest corner, and that his southeast corner lay over east near the Chadwick claim. The evidence here is in sharp conflict, and there is evidence that the Cuban Beauty No. 2 was laid out originally as claimed by plaintiff, and that when Davis pointed east for his southeast corner he by mistake called it the southwest corner, which would thus cut off the triangular piece in the southwest part of the claim. This was all cleared up to the satisfaction of the trial court, and as there was evidence to support its conclusion, it cannot now be disturbed. Besides, the trial court held that as these declarations of Davis were made after he had sold the property to plaintiff, they were inadmissible as affecting plaintiff's title, and this ruling, though objected to at the time, is not now questioned. The bearing of this evidence was confined to its effect upon statements of plaintiff's witnesses as to where the lines of plaintiff's claim were in fact located. Appellant used at the trial a plat by way of illustration. Much of the evidence brought out in connection with this map is so reported as to be unintelligible here, though doubtless was understood by the trial judge. The diagram was not proven to be correct. It furnishes us but little aid because not drawn to show the exact situation of the several claims referred to in the evidence, and is but an approximation of their relation to each other. It is confusing by reason of this fact, and also because the top of the map is south instead of north, which latter is the usual and better method of preparing illustrative maps. From the best consideration we can give of the evidence with this map in hand, we think the findings are supported.

The principal point urged by appellant is, that he was in possession of the contested ground when plaintiff made his last location, and therefore it was not unoccupied mineral land and subject to location by plaintiff.

Defendant claims from the evidence that the man sent to relocate the claim for plaintiff was driven off by defendant before he did any work; that defendant had a dwelling-house on the claim, was living in it and working on the claim, and had done about two thousand dollars' worth of work on it, and had the claim marked off so that the boundaries could be readily traced. And it is claimed that plaintiff had to commit a trespass upon the ground in order to locate. The decisions are not entirely harmonious as to whether an occupation such as is described above under an invalid location would be sufficient to prevent a valid location being made by another qualified person, provided he could do so without the use of force. The question is not necessarily involved in this case. There is evidence which the trial court accepted, showing that the facts are not as above claimed. Defendant had done much work on a claim at considerable distance from plaintiff's claim, and he had a dwelling-house on one of his claims, but it was a mile from plaintiff's claim. There was evidence that these improvements were not on any claim that encroached upon plaintiff's claim. Defendant's map shows a cabin which was erected by defendant more recently, but it is not on plaintiff's claim. The only work done by defendant on any part of plaintiff's claim is described as of but small extent.

The evidence is not that Cousins, who made plaintiff's location, was driven off by defendant at the time the location was made. This circumstance happened some time before, when he went there to do assessment-work under the Davis location. So far as the evidence shows, Cousins made the relocation peaceably and without interruption or objection by any person. He was familiar with the lines by previous examination of them, and he testified that when he relocated the claim he went all over it and found only such evidences of work on it as have been already stated. He found no person on any part of the claim and no one in actual possession of any part of it. The utmost that can be said of the evidence in support of defendant's contention is, that he had an in-

valid location on which he had done much work outside the boundaries of the claim in dispute; that he claimed that his location overlapped and included some of plaintiff's ground, and that in 1899 he had done some prospecting-work on the disputed ground, but was not working this ground when plaintiff's relocation was made.

In view of this state of facts, the case of *Belk v. Meagher*, 104 U. S. 279, would seem to settle the question against defendant's contention. In that case Belk attempted to make a location in December, 1876, and did everything necessary to a valid location if the ground was then subject to location. There was, however, a prior locator whose rights precluded a valid location by Belk. This prior locator's rights expired on January 1, 1877, and were in fact then lost. Belk claimed that upon the failure of the prior locator to keep his location alive his (Belk's) location, made in December, at once attached. The court held that it did not so operate. Between December 19th and February 21st following Belk did a small amount of work on the claim, which did not occupy more than two days of his time, and he had no other possession of the property than such as arose from his location of the claim and his occasional labor upon it. On February 21, 1877, defendants Meagher and others entered on the property peaceably and made another relocation, doing all that was required to perfect their rights, if the premises were then open to them. After showing that the rights of Belk were not affected by the Montana statute, and that his right of location depended entirely on the act of Congress, the court said: "All he got or could get by his entry was possession, and that, to be of any avail, must be actual. Under the provisions of the Revised Statutes relied on, Belk could not get a patent for the claim he attempted to locate, unless he secured what is here made the equivalent of a valid location, by actually holding and working for the requisite time. If he actually held possession and worked the claim long enough and kept others out, his right to a patent would be complete. He had no grant of any right of possession. His ultimate right to a patent depended entirely on his keeping himself in and all others out, and if he was not actually in, he was in law out. A peaceable adverse entry, coupled with the right to hold possession which was thereby acquired,

operated as an ouster, which broke the continuity of his holding and deprived him of the title he might have got if he had kept it for the requisite length of time. He made no such location as prevented the lands from being in law vacant. Others had the right to enter for the purposes of taking them up if it could be done peaceably and without force." The court then said: "There is nothing in *Atherton v. Fowler* (96 U. S. 513) to the contrary of this." Applying the principles of *Belk v. Meagher*, 104 U. S. 279, we must hold that defendant acquired no right to the disputed land which constituted it other than unoccupied public land or precluded plaintiff from making a valid location thereon. See the question discussed and cases cited *pro* and *con* in *Lindley on Mines* (2d ed., vol. 1, secs. 216-219). *Belk v. Meagher* also disposes of appellant's further contention that the repeal of the act of 1897 did not impair his rights vested by virtue of his invalid location. He could only claim such land as he actually possessed and was working in good faith.

The judgment and order should be affirmed.

Gray, C., and Smith, C., concurred.

[Sac. No. 1232. Department One.—September 29, 1904.]

CONTINENTAL BUILDING AND LOAN ASSOCIATION,
Respondent, v. **EMMA A. BOGGESS et al.,** Appellants.

FORECLOSURE OF MORTGAGE—BUILDING AND LOAN ASSOCIATION—CASH SURRENDER VALUE OF SHARES—PLEADING—IRRELEVANT MATTER IN ANSWER.—In an action by a building and loan association to foreclose a mortgage, stipulating that upon default the mortgagee may apply the cash surrender value of the shares pledged as security, upon application of which such shares shall vest in the mortgagee, where the complaint alleges the cash surrender value of the certificate representing such shares, a portion of the answer not denying the cash surrender value alleged, but merely averring that the affairs of the corporation have been corruptly managed by one who is its secretary and manager, and that if its affairs had been properly managed the cash surrender value would be greater, is irrelevant, and was properly stricken out as such.

Do—ANSWER SETTING UP DEFENSE—IRRELEVANT MATTER.—Where the answer, besides containing irrelevant and evidential matter, sets

forth a sufficient defense, only the irrelevant matter should be stricken out, and it is error to strike out the defense.

Id.—STRIKING OUT VERIFIED ANSWER AS SHAM.—A verified answer setting up a defense to the action was improperly stricken out as sham, where the answer was not shown to be unquestionably false in fact, and not pleaded in good faith.

Id.—NATURE OF DEFENSE—MORTGAGE ON MINING PROPERTY—PAYMENT OUT OF PROCEEDS.—Where the plaintiff's mortgage was upon mining property of the defendant, facts properly alleged in the answer showing an agreement that when plaintiff had realized sufficient money out of the mining property plaintiff would pay to the defendant an amount equaling the mortgage debt, and that plaintiff did realize the requisite sum of money, and thereby became equitably bound to apply it in payment of such debt, states a sufficient defense to the action of foreclosure.

APPEAL from a judgment of the Superior Court of Yuba County. Eugene P. McDaniel, Judge.

The facts are stated in the opinion.

Frank M. Stone, for Appellants.

Gavin McNab, for Respondent.

CHIPMAN, C.—Foreclosure of mortgage executed to plaintiff by defendants Emma A. and Riley A. Boggess on certain property situated in the city of Marysville, Yuba County, to secure the payment of a promissory note for three thousand dollars. Plaintiff had judgment, from which defendants appeal on bill of exceptions. It was recited in the mortgage that the mortgagors, having subscribed for thirty shares of the capital stock of plaintiff corporation at the par value of one hundred dollars each, evidenced by certificate number 15,935, the mortgagors promised to pay to mortgagee said amount, in monthly installments of thirty cents per month, for each said share, on the 15th of each month, until fully paid by said payments and by the dividends and accumulations on said shares, and further to pay the monthly premium of eighteen dollars on said loan on the fifteenth day of each month, until said shares are fully paid. And as further security for the payment of said promissory note and interest and the par value of said shares, mortgagors pledged the said shares, and in case of foreclosure of said mortgage or the non-payment of said promissory note or interest, or the said

installments as above set forth, or the premium, mortgagee "may apply, at its option, without notice to said mortgagors, the cash surrender value of said shares as provided in the by-laws of said corporation, . . . to the payment of said promissory note, and the said shares shall thereupon become the property of and vest in said mortgagee." Other provisions to cover advances, payment of taxes, and similar provisions usual to mortgages are set forth in the mortgage.

It is alleged in the complaint also that plaintiff did by resolution declare the whole of said note and mortgage due and payable and elected to foreclose the mortgage; that the advances, installments and premiums on said loan from March 15, 1901, amount to \$851.40; that the cash surrender value of said certificate No. 15,935 of plaintiff's said stock, pledged to plaintiff, was, on March 23, 1903, the day of passing said resolution declaring said note to be due, the sum of \$18.41. Demand of payment and refusal is alleged, with usual prayer for sale of premises, etc.

Defendants answering admitted the execution of the note and mortgage set forth in the complaint; on information and belief denied that plaintiff passed the resolution above referred to; and on information and belief denied that plaintiff made any further advances, and denied that interest, installments, and premium on said loan amount to \$851.40 or any other sum. Further answering the complaint, and particularly that portion which alleges the cash surrender value of said certificate No. 15,935, the answer, after alleging the existence of plaintiff corporation (which is but an admission of the allegation in the complaint), proceeds, in folio 65 to folio 75, to set forth sundry matters which are apparently intended to show that the cash surrender value of said certificate should have been "largely in excess of the value of \$18.41," if the affairs of the corporation had been properly and honestly managed. A motion was made by plaintiff, and granted by the court, to strike out this portion of the answer designated "a" in the motion, on the ground that it is "sham and irrelevant and surplusage" and not "proper matter of averment," and does not "show any defense to an action to foreclose a mortgage." This motion was granted. The answer then sets forth what is called "an equitable and for a further and distinct defense." This portion of the answer

(omitting the unnecessary allegation of the existence of plaintiff corporation) is contained in folios 77 to 99. Designating this matter as "b," plaintiff made a motion to strike it out on the same ground as already stated, which motion was granted.

The portion ("a") of the answer, above referred to, briefly stated, is to the effect that one Corbin was at the time the mortgage was executed and up to the time of the passage of said resolution fixing the value of said certificate, the secretary and manager of plaintiff corporation; that its affairs "have been corruptly, dishonestly and improperly managed by said William Corbin"; that he misapplied and misused large sums of plaintiff's money "as manager of said corporation and in his individual capacity"; that plaintiff attempted to recoup its losses through the acts of said Corbin, and that the property received from him by plaintiff with that view is being carried on plaintiff's books at a valuation "far in excess of the real value of said property so taken"; that plaintiff's affairs have been so conducted by its officers and managers as to greatly decrease the surrender value of said certificate No. 15,935; and that if the said affairs had been "properly and honestly managed, the cash surrender value of said certificate of stock would be greatly in excess of the sum of \$18.41"; that equity requires that the cash surrender value of said certificate should be credited "in the same manner and to the same amount as if the business affairs of said corporation plaintiff had been honestly conducted"; that a large amount of money has been paid by plaintiff "in an improper manner as dividends upon what is termed non-borrowing stock," thus diminishing the surrender value of said certificate; that said Corbin improperly withdrew large sums belonging to plaintiff and charged the same improperly to traveling expenses, thus depreciating the value of said stock. The facts, set forth with much greater particularity than we have given them, are stated by the pleader, we presume, to show that the certificate should have had a greater surrender value than \$18.41. The issuable fact in this case in this respect was the surrender value of the certificate. It was entirely immaterial what such surrender value might have been if the affairs of the plaintiff corporation had been differently managed. The agreement of the parties, as shown by the mort-

gage, was, that the actual surrender value should be allowed. The complaint alleged that such actual surrender value was \$18.41. This allegation was not denied by the matter stricken out, designated heretofore as "a," and, so far as we can see, such portion in no way constituted any answer or defense to plaintiff's cause of action and was properly eliminated by the order.

The portion of the answer designated in the motion as "b" is composed to considerable extent of evidentiary matter purely defensive, and contains some allegations of fact entirely irrelevant and immaterial. Still there are facts properly alleged which show an agreement on the part of plaintiff by which plaintiff agreed that when plaintiff had realized sufficient money out of the mining property mortgaged to it plaintiff would pay defendant Emma Boggess an amount equaling her indebtedness to plaintiff. It was alleged that plaintiff did realize the money, and it thus became equitably bound to apply it in payment of her debt to it. (Civ. Code, sec. 1479.)

The answer was verified, and it is urged that to strike it out as sham was error. (Citing *Greenbaum v. Turrill*, 57 Cal. 285.) We do not think it can be said that the answer was sham, which means an answer good in form but false in fact, and not pleaded in good faith (*Greenbaum v. Turrill*, 57 Cal. 285), and to warrant applying the severe rule of striking the answer from the record the matter must be shown to be unquestionably false and not pleaded in good faith. (Anderson's Dictionary, title "Sham," and cases cited.) This cannot be said of the answer in the present case.

All the matter set up as equitable defense, and designated in the motion as "b," was stricken out. The grounds of the motion other than that it was "sham" were, that it does not tend to show any defense to the action and is irrelevant and surplusage. This is true to some extent, as already intimated, but it is not true as to the entire answer. A motion to strike out the irrelevant averments would therefore have been proper. The object of such a motion is to rid the pleading of its objectionable averments only. The cases cited by respondent as to the rule where redundant or irrelevant matter is alleged are cases, so far as we have found, where the objectionable averments only were attacked. To illustrate: Sup-

pose in an action involving title to real estate the pleader should allege ownership by sufficient averments and should then proceed to set forth his chain of title. On motion these latter averments would be stricken out as surplusage and evidentiary matter, but not the entire pleading. (See the subject discussed in Pomeroy's Code Remedies, 4th ed., secs. 422, 423, 445.) We think it was error to strike out the whole of this portion of the answer.

It is advised that the judgment be reversed.

Gray, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is reversed.

Angellotti, J., Shaw, J., Van Dyke, J.

[Crim. No. 1160. In Bank.—September 30, 1904.]

In the Matter of the Accusation of H. E. BURLEIGH. THE PEOPLE, Appellant, v. H. E. BURLEIGH, Respondent.

ACCUSATION OF OFFICER FOR MISCONDUCT—PURPOSE OF PROCEEDING—EFFECT OF JUDGMENT.—An accusation made by a grand jury under section 758 et seq. of the Penal Code, charging an officer with misconduct in his office, has for its main purpose the removal of the accused from his office. The judgment can go no farther than such removal; and if it involves a criminal offense, the judgment is no bar to a criminal prosecution for such offense.

10.—ACCUSATION NOT AN INDICTMENT—ORDER SUSTAINING DEMURRER—APPEAL BY PEOPLE—DISMISSAL.—The accusation is not an indictment, nor is it to be treated as such. The trial under the accusation is not subject to the rules applying to the trial of an indictment. The people have no right of appeal from an order sustaining a demurrer to the accusation, and its appeal therefrom must be dismissed.

APPEAL from a judgment of the Superior Court of Fresno County. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, J. C. Daly, Deputy Attorney-General, and George W. Jones, District Attorney, for Appellant.

Frank H. Short, for Respondent.

McFARLAND, J.—A written accusation under section 758 et seq. of the Penal Code was made by a grand jury charging the respondent, Burleigh, with misconduct in his office of supervisor. He filed what we suppose may be called a demurrer,—that is, a written document containing objections “to the legal sufficiency of the accusation” as provided in sections 762-763. The demurrer was based on several grounds, and, among others, that the accusation did not substantially conform to the provisions of the Penal Code, or sections 950, 951 or 952 thereof, and that more than one offense was charged. The court below sustained the demurrer, stating in its order that it was sustained for the reason that more than one offense was charged therein. The people appeal from the judgment.

The appellants concede that if the accusation is to be treated as an indictment, then the demurrer was properly sustained. They contend, however, that an accusation under section 758 is not an indictment. They also concede that if that be so, then the people have no appeal, and this appeal would have to be dismissed.

Notwithstanding this peculiar position occupied by appellants, still in order to reach the proper judgment to be rendered on this appeal—that is, whether we should consider the judgment of the court below and either affirm or reverse it, or whether we should dismiss the appeal—it seems necessary to determine whether or not the accusation under section 758 is in law an indictment, and the trial under it subject to the rules which apply to the trial of an indictment; and, in our opinion, such accusation is not an indictment, and is not to be treated as such.

The main argument of respondent is, that an accusation comes strictly within the definition of an indictment, which is defined in section 917 as follows: “An indictment is an accusation in writing, presented by the grand jury to a competent court, charging a person with a public offense.” But an accusation under section 758 is not an accusation “presented by a grand jury to a competent court”; it “must be delivered

by the foreman of the grand jury to the district attorney." When an indictment is found by a grand jury it "must be presented by their foreman in their presence to the court" (sec. 944), and must have certain indorsements; and the defendant may, on motion, have the indictment set aside "where it is not found, indorsed, and *presented* as prescribed in this code." (Sec. 995.) The proceedings on an indictment and the consequences following a judgment thereon are entirely different from those accompanying the trial on an accusation under section 758. A warrant of arrest follows an indictment, under which the defendant is immediately imprisoned unless he gives bail. Nothing of the kind occurs on an accusation; the party accused is merely served by the district attorney with a copy of the accusation and notified to appear within a certain time and answer it, and may appear or not as he chooses, as in a civil action. In an indictment only one public offense can be charged; its main purpose is to punish the defendant for the commission of a crime; and an acquittal or conviction is a bar to a future prosecution for the offense charged. The main purpose of the accusation under section 758 is to remove a person from public office for misconduct in such office; the misconduct charged need not necessarily include an act which would itself constitute a crime, and if it does include such crime the judgment on the accusation would not be a bar to a subsequent prosecution for such crime. The judgment can go only to the extent of a removal from office. The provisions of the Penal Code clearly make a distinction between an indictment or information and the procedure by "accusation" here under review. Section 682 provides that "Every public offense must be prosecuted by indictment or information, except—1. Where proceedings are had for the removal of civil officers of the state." Again, it is provided in section 888 that "All public offenses triable in the superior courts must be prosecuted by indictment or information, except as provided in the next section,"—and the next section (889) provides that "When the proceedings are had for the removal of district, county, municipal, or township officers, they may be commenced by an accusation or information, in writing, as provided in sections 758 and 772." In section 18 of article IV of the constitution, after a provision for the impeachment before the senate of the governor and other named state officers, it is provided that "All other civil of-

ficers shall be tried for misdemeanor in office in such manner as the legislature may provide." The legislature, perhaps, might have provided that the proceeding for the removal of an officer should be by indictment; and if that had been the intent, a few words would have expressed it. That, however, was clearly not the intent, for the legislature by 758 and succeeding sections has elaborately provided an entirely different procedure. These sections immediately succeed the sections relating to impeachment before the senate, and they are evidently intended to be similar in character to articles of impeachment. This intent is emphasized in section 762, which provides that the accused may object to the sufficiency of the accusation "or of any *article* therein." There are no decisions of this court in point. In the case of *People v. Ward*, 85 Cal. 585, cited by respondent, the point was not raised, and the one or two allusions in the opinion to the proceeding as an indictment were evidently merely for convenience of statement, and are not to be taken as a decision of a question not before the court. It was held there that the charge against the appellant was insufficient because there was "no averment of any illegal act by appellant," and that ground of reversal would have been good whether the proceeding was considered as an indictment or as an accusation within the meaning above stated.

But as the appellants concede that if the accusation is not an indictment the people have no appeal, therefore the appeal herein must be dismissed, and it is so ordered.

Angellotti, J., Shaw, J., Van Dyke, J., Lorigan, J., and Henshaw, J., concurred.

[Crim. No. 1202. In Bank.—September 30, 1904.]

EDWARD RICHARDS, Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO et al., Respondents.

CRIMINAL LAW—TRANSCRIPT OF TESTIMONY—DUTY OF PHONOGRAPHIC REPORTER—MANDAMUS.—It is not the duty of the phonographic reporter in a criminal case to transcribe the testimony for the use

of the defendant without the payment or tender of fees therefor, unless the court itself orders the testimony written up; and in the absence of such order or tender of fees *mandamus* will not lie to compel the transcription.

Id.—DISCRETION OF COURT.—It is wholly within the discretion of the court whether or not it will order the evidence written up at the expense of the county; and the court cannot be compelled by *mandamus* to fix a time within which the phonographic reporter shall transcribe his notes, unless there is a legal duty resting upon the reporter to transcribe the same.

PETITION for Writ of Mandate against the Superior Court of the City and County of San Francisco. William P. Lawlor, Judge, and Platt B. Elderkin, Phonographic Reporter.

The facts are stated in the opinion of the court.

Milton Shepardson, for Petitioner.

No appearance for Respondents.

HENSHAW, J.—This is an original petition for a writ of mandate against the respondents, the Hon. W. P. Lawlor, judge of the superior court, and Platt B. Elderkin, his official phonographic reporter. The application for a writ is based upon the provisions of section 269 of the Code of Civil Procedure, as follows: "Such reporter, or any one of them, where there are two or more, must, at the request of either party, or of the court in a civil action or proceeding, and on the order of the court, the district attorney, or the attorney for the defendant in a criminal action or proceeding, take down in shorthand all the testimony, . . . and if directed by the court, or requested by either party, must, within such reasonable time after the trial of such case as the court may designate, write out the same, or such specific portions thereof as may be requested, in plain and legible longhand, or by typewriter, or other printing machine, and certify to the same as being correctly reported and transcribed, and when directed by the court, file the same with the clerk of the court." As to the phonographic reporter, a demand or request for a transcription is alleged, with the reporter's refusal to comply therewith. As to the judge, it is averred that after request he has

refused to designate a reasonable time within which the transcription by the phonographic reporter shall be made.

We are of the opinion that as to neither of the respondents should the writ issue. We are further of the opinion that for the correction of possible abuses, and for the elucidation of the proper procedure in such cases, a brief exposition of the matter will be both pertinent and valuable.

First, as to the judge: Section 269 contemplates that, in the exercise of his sound discretion, the judge may order a transcript of proceedings, or of any part of them, to be made by the phonographic reporter. When so ordered by the judge, or "by the court," the fees of the phonographic reporter become a proper charge against the county treasury. (Code Civ. Proc., sec. 274.) Section 269 further contemplates that, in a proper case, the trial court, when called upon, will designate the "reasonable time" within which the phonographic reporter shall file the transcription of his notes. A proper case is one where it has become the duty of the phonographic reporter to make the transcription, and where, for the orderly and expeditious procedure of the case, the court is asked to designate the time within which the phonographic reporter shall perform his duty. But, manifestly, if the case be one where the shorthand reporter is not called upon to make a transcript, it is not one which calls for a declaration of time upon the part of the court.

The application for a writ against the respondent judge for having refused to designate such a time is denied, because, for reasons next hereinafter to be considered, the case was not one calling for a declaration from the court.

We thus come to, second, the rights of the parties and the duties of the phonographic reporter. Section 269 in this regard provides that the reporter must, if requested by either party, transcribe such specific portions of his notes as may be designated. We have already seen that when this request is made by the court the law expressly provides that the phonographic reporter's fees shall be a charge against the county treasury. But where the request is made by either party it becomes the duty of the reporter to make the transcription only upon tender or payment to him of his legal fees and charges. A defendant in a criminal case, like a defendant in a civil case, is chargeable with fees as to all matters, sav-

ing those from the payment of which he is especially exempted by law. He is so especially exempted as to certain matters. He is exempted from bearing all or any part of the costs of his trial. Upon his appeal the state, in its liberality, requires the county clerk to prepare and print, as a county charge, his transcript. By express enactment of law, no fee is exacted for the filing of his papers upon appeal in this court. But each and all of these exemptions are matters of express statutory enactment. Where the codes are silent, the costs are still thrown upon a defendant in a criminal case, as well as upon a defendant in a civil case. Thus the defendant must himself pay for the printing of the brief which he presents to this court. The same holds true when a demand is made directly upon the phonographic reporter for a transcript of all or any part of the proceedings upon his trial. If he orders it himself, he must pay for it himself, and until he pays the phonographic reporter is not compelled to do the work. If he is unable to pay, an appeal may always be made to the judge, who will thus have an opportunity to review the request, and to designate the transcription of such portions of the record as may be fit and necessary for the purpose intended. In such cases the rights of the county are preserved, in that the expenses of an excessive transcript are not cast upon it, and, upon the other hand, the defendant's rights are fully protected, since, without cost to him, he has obtained all that he is entitled to present upon his appeal.

The construction contended for by petitioner would lead to unbearable abuses and untold extravagance. It would result that in every criminal case in which a conviction was had, by the mere request of the defendant, he could cause every word of the proceedings to be transcribed and the cost of the transcription made a burden upon the county. Under such a system, it would at least be a question whether or not the state could not better permit the depredations of felons to go unpunished, as causing the community less loss than would their successful prosecution to conviction.

Therefore, to sum up, we hold that it is the duty of the phonographic reporter to comply with the request made by either of the parties litigant, only upon payment to him of his fees; that it is his duty, when ordered by the court, to furnish

transcripts, his fees being then a charge upon the county treasury.

For the foregoing reasons the petition for mandate is denied.

Beatty, C. J., Van Dyke, J., Shaw, J., Angellotti, J., Lorigan, J., and McFarland, J., concurred.

[S. F. No. 3937. In Bank.—September 30, 1904.]

**JAMES CAHILL and WILLIAM CAHILL, Petitioners, v.
THE SUPERIOR COURT OF THE CITY AND
COUNTY OF SAN FRANCISCO et al, Respondents.**

ESTATES OF DECEASED PERSONS—PROBATE HOMESTEAD—MOTION TO MODIFY AND VACATE ORDER—JURISDICTION.—The superior court has jurisdiction to hear and determine upon its merits a motion made within six months after an order setting apart a homestead out of the estate of a deceased person to modify and in part to vacate the order; and an objection that the facts stated as grounds of the motion did not justify a modification or vacation of the order furnishes no reason for refusing to hear and consider the motion.

Id.—EFFECT OF ORDER DENYING MOTION FOR WANT OF POWER—DISMISSAL—REFUSAL TO ACT.—An order denying the motion solely on the ground stated, that the original order setting apart the homestead had become final, and that the court was without power to modify or vacate the former order, or to entertain a motion to that effect, is in substance no more than a dismissal of the motion for lack of jurisdiction and a refusal to act upon the motion.

Id.—DETERMINATION NOT CONCLUSIVE—DUTY OF COURT—MANDAMUS.—The determination by the court that it did not have jurisdiction to modify or vacate the order setting apart the homestead is not conclusive where there is no question of fact or of the sufficiency of facts involved in its ruling. The law especially enjoins upon the superior court the duty of hearing and determining all matters which are within its jurisdiction and which come properly before it; and the writ of mandate may issue to compel the court to hear and determine the motion upon its merits.

Id.—LACK OF REMEDY BY APPEAL.—An appeal from the original order setting apart the homestead would have been useless, as it was made without notice or contest, and there could be no bill of exceptions showing the facts upon which it was based; and the order refusing to vacate or modify the order setting apart the homestead is not appealable.

Id.—REMEDY BY MANDAMUS—LACHES—EXCUSE FOR DELAY—DISCRETION OF COURT.—The defense of laches to the remedy by *mandamus* dif-

fers from that of the statute of limitations, which bars the remedy from mere lapse of time; and where the defense of laches merely is relied upon the petitioner for the writ may present circumstances excusing or justifying the delay, and showing the absence of prejudice therefrom; and if the court in its sound discretion deems the showing sufficient, the remedy will not be barred by laches.

PETITION for Writ of Mandate to the Superior Court of the City and County of San Francisco. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Richard C. Harrison, for Petitioners.

George A. Connolly, for Respondents.

SHAW, J.—This is a proceeding in *mandamus* to compel the superior court and Frank J. Murasky, as judge thereof, to hear and consider a motion of the petitioners duly presented to said court, to modify, and in part vacate, a previous order of the court in the matter of the estate of Patrick H. Cahill, deceased, setting apart a homestead to the widow of the deceased out of the property of the estate.

The motion for the modification was made and presented within six months after the order setting apart the homestead. When the motion was presented to the superior court the widow appeared thereto and objected to the hearing. The objections were,—1. That the court had no jurisdiction to vacate the former order; and 2. That the facts stated as the grounds of the motion did not justify a modification or vacation of the order.

The ground last stated furnished no reason for refusing to hear and consider the motion. It was addressed to the merits, and could only be considered after the court had, upon the consideration of the first objection, decided that it had jurisdiction to entertain the motion and make the order applied for. Both objections were taken up together and argued and submitted simultaneously. This was manifestly done merely for convenience, and in order to avoid the delay that would be occasioned by another hearing, in case the objection to the jurisdiction should be overruled. The objection to the jurisdiction was not based on any facts, nor upon any defect in the service of the notice on the widow, but solely on the propo-

sition that the original order had become final and was beyond the power of the court to revoke or modify. The preamble to the order thereupon made shows that the court never reached the consideration of the motion, but decided that the first objection was sound, and that it was without power to modify or vacate the former order or to entertain a motion to that effect. The order accordingly stated that "Upon this ground, and this only, the motion to vacate the decree heretofore made setting apart the homestead is denied." The order thus made is therefore in substance no more than a dismissal of the motion for lack of jurisdiction. As the case stands, the superior court has refused to act upon the motion, and has not acted thereon.

Another objection is made here to our consideration of the question of the power of the court to modify the order. It is, that the court below has determined that it did not have jurisdiction, and that that determination is conclusive and cannot be reviewed in this court upon this proceeding. The order refusing to vacate or modify the order setting apart the homestead is not appealable. (*Estate of Cahill*, 142 Cal. 628.) An appeal from the original order would have been useless, for, as it was made without notice or contest, there could be no bill of exceptions showing the facts on which it was based. Therefore, if the decision of the court, that it did not, as matter of law, have jurisdiction to act, is conclusive as to the law, the petitioners are without remedy, although the original order may have been manifestly erroneous, or may have been fraudulently obtained, and the court may have been utterly mistaken in its view that it was without power to modify it. That it was mistaken in that view is definitely settled by the decision of this court in *Levy v. Superior Court*, 139 Cal. 590, holding that the superior court has power to vacate such an order under section 473 of the Code of Civil Procedure.

This court has held that where the jurisdiction of the superior court to try a cause or hear an appeal depends on the existence of certain facts, and that court has, upon evidence consisting either of affidavits or of the record, made its determination as to the facts, although erroneously, this court cannot in *mandamus* proceedings go behind this determination and itself consider from evidence whether or not the jurisdiction existed; and this seems to be the law even where

there is no conflict in the evidence and the court below has acted judicially only to the extent that it has determined the existence of facts from evidence, and where the facts thus determined did not in law justify the decision of the superior court that it did not have jurisdiction. Thus where the lower court, acting as a court of appeal, has decided that the record in a case from a justice's court did not give the superior court jurisdiction of the appeal because the notice of appeal did not have a revenue-stamp attached, or because in an appeal on questions of law alone there was no statement on appeal, and has thereupon dismissed the appeal (*People v. Weston*, 28 Cal. 640; *Lewis v. Barclay*, 35 Cal. 213); or where the superior court upon affidavits removed the cause to the United States district court and refused to proceed further therein (*Francisco v. Manhattan Ins. Co.*, 36 Cal. 286); or upon the facts stated in a petition to be allowed to intervene had refused to allow the intervention (*People v. Sexton*, 37 Cal. 532); or after considering the condition of its calendar and other facts and circumstances tending to excuse the failure to try a criminal case within sixty days after the filing of the information, had refused to dismiss the cause (*Strong v. Grant*, 99 Cal. 100); or upon the facts stated in an accusation filed under section 772 of the Penal Code, had refused to issue a citation against the accused officer (*Kerr v. Superior Court*, 130 Cal. 184). In all these cases the determination of the superior court as to its jurisdiction of the particular cause upon the facts shown has been deemed final and conclusive upon this court where a review of that determination was sought by proceedings in *mandamus*.

The distinction between this class of cases and the case at bar is this: In all these cases the superior court was called upon to consider either the sufficiency of certain facts established by the record, or certain facts determined by that court upon evidence properly addressed to it, to give it jurisdiction to proceed with the particular case then before the court, and with its decision, after such consideration, this court cannot interfere by *mandamus*. In the case at bar there was no question of fact involved, and the superior court decided that, as a matter of law purely, it could not in any case vacate an order made under the provisions of section 1465 of the Code of Civil Procedure setting apart a homestead. This was a

proposition not dependent on any facts whatever, but wholly upon a consideration of the powers of the court as defined by the constitution and by statute.

The code provides that the writ of mandate may be issued to "compel the performance of an act which the law specially enjoins, as a duty resulting from an office." (Code Civ. Proc., sec. 1085.) The law specially enjoins upon the superior court, and upon the judge thereof, the duty of hearing and determining all matters which are within its jurisdiction and which come properly before it. The motion under consideration did come properly before that court, but the judge decided, as matter of law, and upon the statute and constitution only, that the court had no power in any case to make orders of the kind there applied for, and upon that ground only refused to proceed to the merits of the application. If the person holding the office could thus decide what were the duties pertaining thereto which the law specially enjoins him to perform, the writ of mandate would be practically useless. The decision refusing to act which gives occasion for the writ would also furnish sufficient cause for denying it. As was well said in *Temple v. Superior Court*, 70 Cal. 211, "The court cannot, by holding without reason that it has no jurisdiction of the proceedings, divest itself of jurisdiction and evade the duty of hearing and determining it." To the same effect are *Merced M. Co. v. Fremont*, 7 Cal. 130; *Ortman v. Dixon*, 9 Cal. 23; *Heinlen v. Cross*, 63 Cal. 44; *People v. Barnes*, 66 Cal. 594; *Crocker v. Conrey*, 140 Cal. 213.

The respondent further claims that the petitioners are barred of their remedy in *mandamus* by reason of their laches.

Laches is defined as "Such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity." (18 Am. & Eng. Ency. of Law, 2d ed., p. 97.) "In determining what will constitute such unreasonable delay, regard will be had to circumstances which justify the delay, to the nature of the case and the relief demanded, and to the question whether the rights of the defendant, or of other persons, have been prejudiced by such delay." (*Taylor v. Bayonne*, 57 N. J. L. 378; *People v. Syracuse*, 78 N. Y. 56; *Chinn v. Trustees*, 32 Ohio St. 236; 19 Am. & Eng. Ency. of Law, 2d ed., p. 755;

Merrill on Mandamus, sec. 87; Wood on Mandamus, 40.) "Where the delay is satisfactorily explained, the equity of the complainant, if clearly established, remains unaffected, and the court will decree for him, notwithstanding great efflux of time." (18 Am. & Eng. Ency. of Law, 2d ed., p. 100.) The statute of limitations applies to special proceedings of this kind. (Code Civ. Proc., sec. 363; *Barnes v. Glide*, 117 Cal. 6.¹) The defense of laches is different from the defense of the statute of limitations in this, that in order to bar a remedy because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed; whereas, in the case of the statute of limitations there need be nothing more than mere lapse of time in order to constitute a bar. The consequence of this distinction is, that in cases where the defense of laches is interposed, or where it is claimed to appear on the face of the petition or complaint, the petitioner or the plaintiff may present circumstances excusing or justifying the delay and showing the absence of prejudice therefrom, and if the court in its sound discretion deems the showing sufficient the proceeding will not be barred. Many cases have been cited by the respondents in support of the proposition that the lapse of time between the refusal to act upon the motion and the beginning of the proceeding in this court for *mandamus* of itself constitutes laches sufficient to bar the proceeding; but upon an examination of them we find that, with very few exceptions, there appears in each case cited some circumstance from which it appeared that prejudice actually had occurred, or might occur, or such lapse of time that it was supposed that prejudice had occurred, or would occur, if the writ was granted. The few exceptions are not well-considered cases, and are not sufficient to establish a rule contrary to that above cited from the authorities.

The order of the superior court refusing to consider the motion for a modification was made on April 10, 1903, but was not entered until after May 6, 1903. Within sixty days from the entry petitioners attempted to appeal therefrom to this court. On December 7, 1903, the widow moved to dis-

¹ 59 Am. St. Rep. 153.

miss the appeal on the ground that the order was not appealable. This court, on March 28, 1904, granted the motion and dismissed the appeal. An application for rehearing was made and denied, and on April 28, 1904, the *remittitur* was issued. This application for a writ of mandate was filed five days thereafter. The respondents herein do not allege that any circumstances exist, or that anything has occurred by reason of the delay, that have caused or would cause any prejudice whatever to the widow or to any other person. The lapse of time has not been so great that under the circumstances we can suppose or presume that prejudice will ensue if the mandate is issued. Until the decision dismissing the appeal, it had never been directly held by this court that an order refusing to vacate or modify an order setting apart a homestead was not appealable, and there was a very general impression that such an appeal could be taken. If so, the remedy would be ample and there could be no writ of mandate. During the delay the petitioners were diligently prosecuting the remedy by appeal, which they were advised they had. We think, under the circumstances, the delay was sufficiently excused, and that the court below should be compelled to proceed to hearing and determination of the motion upon its merits.

Let the writ issue as prayed for.

Van Dyke, J., Angellotti, J., Henshaw, J., Lorigan, J., and Beatty, C. J., concurred.

McFARLAND, J., dissenting.—I dissent. In the first place, if what respondent did could be construed as a *refusal to act* for want of jurisdiction, it does not appear that respondent had jurisdiction. In *Levy v. Superior Court*, 139 Cal. 590, and cases there cited, it was merely held that section 473 of the Code of Civil Procedure, which provides for relieving a party from the judgment or order taken against him "through his mistake, inadvertence, surprise, or excusable neglect," applies to certain probate orders, and that only under said section can orders not appealable be reached. But in the case at bar the petition to set aside was not based on section 473, but merely on certain alleged errors in the order sought to be vacated. In the second place, the respondent acted in the matter, and ordered that "the motion to vacate

the decree hereinbefore made setting apart the homestead is denied"; and, in my opinion, the reasons upon which the action was based are immaterial. Having acted, respondent cannot be compelled by *mandamus* to act differently.

[L. A. No. 1429. In Bank.—October 1, 1904.]

COUNTY OF SAN DIEGO, Appellant, v. JOHN F. SCHWARTZ, County Treasurer, etc., Respondent.

COLLATERAL INHERITANCE TAX LAW—COMMISSIONS OF TREASURER—MODIFICATION OF STATUTE—COUNTY GOVERNMENT ACTS.—Section 20 of the Collateral Inheritance Tax Law, giving to the treasurer of each county a commission on all sums collected thereunder in addition to his salary, though not wholly repealed, has been so far modified by the County Government Acts of 1893 and 1897 that the commissions cannot be received by the county treasurer individually to his own use, but must be paid into the treasury of the county.

APPEAL from a judgment of the Superior Court of San Diego County. E. S. Torrance, Judge.

The facts are stated in the opinion.

U. S. Webb, Attorney-General, George A. Sturtevant, Deputy Attorney-General, Cassius Carter, District Attorney, and W. R. Andrews, Deputy District Attorney, for Appellant.

A. Haines, and M. L. Ward, for Respondent.

Arthur G. Fisk, and J. P. Langhorne, *Amici Curæ*, also for Respondent.

SMITH, C.—This is an agreed case, submitted under the provisions of section 1138 of the Code of Civil Procedure. The case is properly entitled as above—though otherwise in the transcript. The defendant is the treasurer of the county of San Diego, and was such during the preceding term, commencing in January, 1899. He now has in his hands of the sum collected by him as collateral inheritance taxes under the act of March 23, 1893, (Stats. 1893, p. 193,) a balance of \$601.96, for which he is sued, and to which, he

claims, he is personally entitled, under section 20 of the act, which reads as follows: "The treasurer of each county shall be allowed to retain, on all taxes paid and accounted for by him each year, under this act, in addition to his salary or fees now allowed by law, five per centum on the first fifty thousand dollars so paid and accounted for by him, three per centum on the next fifty thousand dollars so paid and accounted for by him, and one per centum on all additional sums so paid and accounted for by him."

The question submitted was whether the plaintiff is entitled to recover the money in question; and this, again, resolves itself into the question whether the provisions of section 20 of the Collateral Inheritance Act have been so affected or modified by the County Government Act of March 24, 1893, (Stats. 1893, p. 507; Stats. 1895, p. 10,) or by the subsequent County Government Act of 1897 (Stats. 1897, p. 573), as to entitle the plaintiff to recover. The court adjudged the contrary and the plaintiff appeals.

The case is in principle similar to that of the *County of Kern v. Fay*, 131 Cal. 547, where a judgment for the county was affirmed; and the same judgment, we think, should have been rendered here. In that case the suit was against the district attorney to recover the sum of \$630, collected by him as fees in suits for the foreclosure of certificates of purchase of state school lands, and to which defendant claimed he was entitled under section 3553 of the Political Code, which reads: "The district attorney is entitled to receive ten dollars for each suit brought, to be taxed as costs." The question considered was as to the effect upon this provision of the provisions of section 216 of the County Government Act of 1893; which reads: "The salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, either as officers, or *ex officio* officers, their deputies and assistants, unless in this act otherwise provided." (Stats. 1893, p. 507; Stats. 1895, p. 10.) It was held in effect: *First*, "that the salary prescribed by said act [was] intended to compensate said officer [the district attorney] in full for all services rendered by him in his official capacity," and that he could not "retain for his own use any moneys collected by him in [such] capacity"; *second*, that the act did not necessarily

repeal the section of the Political Code in question; and *third*, that whether that section was repealed or otherwise, the county was entitled to recover:—the reason given for the last proposition being, that “the money was collected by the appellant, Fay, in his official capacity as district attorney, and he cannot now be heard to say that it was paid to him illegally, and that he therefore has a right to retain it.”

These propositions effectually dispose of all the points urged by respondent's counsel, unless the difference between the office of the district attorney and that of the treasurer is to be regarded as material; or unless the decision in that case is to be repudiated on the ground that, under the rule stated in section 325 of the Political Code, the sections of the County Government Act, having been a part of the previous act, are not to be considered as having been re-enacted when the act was amended in 1893, and again in 1897, but as having been the law from the time they were first enacted in 1883; and hence that they do not repeal by implication the inconsistent provisions of the Collateral Inheritance Tax Law of 1893. We do not think the character of the particular office was regarded as material by the court, but even if it were so the principle would be the same in its application; for the provisions of the County Government Act relating especially to the treasurer even more clearly show that these and other fees were not thereafter to be received by him to his own use. (Stats. 1893, p. 368 et seq., secs. 70-72, 80-82, 84-89.) As to the repeal by implication, the question is not important to the decision of this case; for there was also an express repeal. The act of 1893, and that of 1897 as well, contained a section declaring that “All acts and parts of acts inconsistent with this act are hereby repealed.” (Stats. 1893, p. 513, sec. 236; Stats. 1897, p. 577, sec. 232.) It is true that this section was also contained in the previous act of 1885, but the rule of section 325 of the Political Code cannot be applied to such repealing provisions; for if so, it would render all such provisions after the first absolutely ineffective. The provisions of the County Government Act on the subject of the fees of the treasurer for the collection of inheritance taxes are directly contrary to those of the tax law, in so far as the latter provides that he may apply them to his own use, and the later law is therefore a direct repeal of the former, in virtue of the

repealing provision above quoted. The principles of the decision in *County of Kern v. Fay*, 131 Cal. 547, are therefore clearly applicable, even if the ground upon which the repeal was declared in that case be wrong.

As to the application of the points decided to this case, the first proposition is obviously applicable. As to the second, we are of the opinion that section 20 of the Collateral Inheritance Act was not wholly repealed by the County Government Act, but was modified so that thereafter the fees retained were not for the use of the treasurer as an individual. As to the third, it is immaterial whether the moneys retained are to be held for the use of the state or for the county. If the former, they were legally in the custody, or ought to have been in the custody, of the county until paid over to the state; and there can be no doubt that the county, even before the passage of the County Government Act, was entitled to sue for and recover them. Since the passage of that act there can be no doubt of the county's title. (Stats. 1897, p. 573, secs. 216 et seq.)

The principles of the decision in *County of Kern v. Fay*, relating to the personal right of the treasurer to the fees under the County Government Act, have been substantially reaffirmed in the later cases of *In re Dodge*, 135 Cal. 512, and *County of Humboldt v. Stern*, 136 Cal. 63.

We advise that the judgment be reversed and the cause remanded, with directions to the court below to enter judgment for the plaintiff for the amount in controversy.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with directions to the court below to enter judgment for the plaintiff for the amount in controversy.

Henshaw, J., Lorigan, J., McFarland, J.,
Shaw, J., Van Dyke, J.

ANGELLOTTI, J., dissenting.—I dissent. It would serve no useful purpose to here indulge in an extended discussion, or to do more than to state that, in my opinion, there has been no repeal or modification of the provision of the Collateral Inheritance Tax Law enacted March 23, 1893, by which the

legislature provided that the county treasurer should receive and retain, *in addition to the compensation provided by the County Government Act*, certain commissions upon all amounts collected by him for the state, under the provisions of the Inheritance Tax Law.

The three cases cited in the majority opinion do not appear to me to be at all in point.

County of Kern v. Fay, 131 Cal. 547, presented a question as to the right of the district attorney to retain for himself an attorney fee, collected as costs, in a certain class of actions, the alleged right being based on a section of the Political Code (sec. 3553) as enacted in 1872. It was very properly held therein that the effect of the subsequent adopted County Government Act system was to deprive the district attorney of any right to retain money under the provisions of the old section of the Political Code. The intention of the legislature to this effect was so clearly indicated by the first County Government Act adopted under the constitution of 1879 (Stats. 1883, p. 299) that it could not well have been held otherwise.

County of Humboldt v. Stern, 136 Cal. 63, involved an entirely different question,—viz., as to whether a county officer could enter into a valid contract with the county for the performance of services other than those pertaining to his office. Four of the justices held that the effect of the provisions of the County Government Act was “to render the officer incompetent to enter into a contract for compensation for any services he may render the county, and to render such contract void.” Whether that decision was correct or not, it in no degree assists in the determination of the question here presented. *Dodge v. San Francisco*, 135 Cal. 512, involved the question as to the effect of certain provisions of the charter of the city and county of San Francisco relative to the compensation of the assessor thereof, and it was held that by reason thereof he could not receive any compensation for any official services except such as were given him by the charter, the matter of the compensation of the officers of such city and county being, under section 8½ of article XI of the constitution, a matter concerning which it was competent to provide in the municipal charter.

Rehearing denied.

[S. F. No. 3387. In Bank.—October 1, 1904.]

J. H. HENRY, Appellant, v. GARDEN CITY BANK AND TRUST COMPANY OF SAN JOSE, Respondent.

MORTGAGES—FORECLOSURE—TAX ON SECOND MORTGAGE—SALE TO STATE—REDEMPTION—PERSONAL LIABILITY.—One who has foreclosed a prior mortgage, making a second mortgagee a party, and becomes purchaser under the sale, is not a party to the security of the second mortgage within the meaning of section 4 of article XIII of the constitution and section 3627 of the Political Code; and where such purchaser redeemed the land from sale under taxes levied upon the second mortgage he cannot recover the amount so paid from the second mortgagee, who was not personally liable for such taxes nor bound to refund the amount so paid to such purchaser, with whom he had no contractual relation.

APPEAL from a judgment of the Superior Court of Santa Clara County. W. G. Lorigan, Judge.

The facts are stated in the opinion of the court.

Jackson Hatch, for Appellant.

S. F. Leib, for Respondent.

VAN DYKE, J.—The court below sustained the demurrer to the second amended complaint, and, the plaintiff declining to further amend, judgment was entered accordingly, and in favor of the defendant, from which this appeal is taken. The complaint consists of two counts. In the first it is alleged that one Murphy, being the owner of a certain tract of land situate in the county of San Luis Obispo, executed a mortgage to the plaintiff October 1, 1895, to secure the sum of thirty thousand dollars, with interest; that subsequently—to wit, February 16, 1897—said Murphy executed a second mortgage to the defendant to secure the sum of \$16,670; that on May 9, 1898, plaintiff brought an action to foreclose his said mortgage, making the defendant herein a party defendant in said action; that said defendant made default, and plaintiff, August 11, 1898, had the usual decree of foreclosure; that on September 5, 1898, said property was sold under said decree of foreclosure and plaintiff became the purchaser for the

amount specified in the judgment and decree, and there being no redemption a deed was duly executed and delivered to the plaintiff by the sheriff on said sale April 15, 1899, and ever since said sale the plaintiff has been, and now is, the owner of said land; that on the first Monday of March, 1898, the debt, amounting to \$16,670, due defendant, and so secured by said mortgage executed by said Murphy, was assessed by the assessor of said county against the defendant corporation for the purpose of state and county taxes and for special school tax; that said defendant neglected and refused to pay said tax, and that such proceedings were thereafter had by the proper officers of said San Luis Obispo County, because of such failure and refusal to pay said taxes, amounting with interest and penalties to the sum of \$405.77; that the lands covered by the said mortgage were duly and regularly sold to the state of California and purchased by said state; that thereafter—to wit, on March 5, 1900—the plaintiff, in order to remove the lien and encumbrance resulting from such sale, was obliged to pay, and did pay, the sum of \$406.30 to effect a redemption of said lands from the sale to the state. The second count is the same as the first, except that it relates to the taxes of 1899, which defendant failed to pay, and which became delinquent, and which the plaintiff paid before any sale thereof to the state.

Among other grounds stated in the demurrer was that the complaint failed to state a cause of action, and we think it was properly sustained on that ground. The appellant bases his claim for a recovery of the amount paid by him to remove the encumbrance and lien on the property he purchased upon the provision of the constitution, carried into the Political Code (Const., art. XIII, sec. 4; Pol. Code, 3627). The provision in the constitution reads: "A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other quasi-public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county,

city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment, a full discharge thereof; provided, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year."

The constitution, it will be seen, says: "The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security." Here, however, the plaintiff was not a party to the security in question. After becoming the owner of the property, he redeemed from the state, and paid the taxes assessed upon the land, as stated, for the purpose of relieving his property from this cloud upon his title. The defendant, however, derived no benefit therefrom, and is under no obligation to refund the amount so paid. The question here presented has, however, been directly decided by this court adversely to the contention of the appellant in *Canadian Co. v. Boas*, 136 Cal. 419. The appellant concedes this to be so, but contends that the principles involved in that case do not appear to have been thoroughly considered by the court, and that they are in conflict with the decision in *San Gabriel etc. Co. v. Witmer etc. Co.*, 96 Cal. 623, and that the importance of the question involved calls for a re-examination before being the basis of subsequent decisions. The opinion in *San Gabriel etc. Co. v. Witmer etc. Co.*, relied upon by appellant, was by a divided court of four to three, and was followed in *Angus v. Plum*, 121 Cal. 608, and, as stated in the court's opinion, "whether that decision was right or wrong," upon the ground that the parties to the controversy in the latter case had acted upon the rule laid down in the former. In *McPike v. Heaton*, 131 Cal. 109,¹ the defendant was the owner of the undivided half of certain land on the first Monday of March, 1897, and had been such owner

¹ 82 Am. St. Rep. 335.

for some time, and on the 24th of March conveyed his interest to one Jackson, who on the next day conveyed it to the plaintiff by a grant-deed. The land was assessed to defendant Heaton for the fiscal year commencing July 1, 1897, and taxes were levied on the land for that year, and on November 29, 1897, plaintiff, for the purpose of removing the lien of these taxes, paid the same to the proper officers, and brought the action under consideration to recover from the defendant the amount thus paid. Plaintiff had judgment in the lower court, which was reversed here. In the opinion of this court it is said: "The plaintiff had no contractual relation with the defendant, and his covenant with Jackson did not pass to them. They could have protected themselves against these taxes either by assuming their payment as part of the consideration for the purchase or by suitable covenants with Jackson, but they have no right of action therefor against the defendant. *San Gabriel etc. Co. v. Witmer etc. Co.*, 96 Cal. 623, cited by the respondents, involved a consideration of the relative obligations between a mortgagee and the owner of the land mortgaged, by reason of the peculiar provisions of the constitution in reference to the assessment and payment of taxes upon these respective interests in the land, and was determined upon the ground that by virtue of these provisions there is a personal obligation upon the mortgagee in favor of the mortgagor for the payment of the taxes assessed upon the mortgage, and that if these taxes are paid by the owner of the land he may reimburse himself therefor, either by deducting the amount from the mortgage debt or in a separate action therefor. There is, however, no personal obligation upon the owner of land for the taxes levied against it, and the payment of such taxes can be enforced only by a sale of the land in the mode prescribed by the statute. The defendant was under no personal liability for the taxes paid by the plaintiffs, and the case cited is not applicable to the present case." The opinion in that case was signed by one of the justices composing the majority of four in *San Gabriel etc. Co. v. Witmer etc. Co.*, 96 Cal. 623. The opinion in *Canadian Co. v. Boas*, 136 Cal. 419, was written by another of the justices who concurred in *San Gabriel etc. Co. v. Witmer etc. Co.* This last case, as already stated, is on all fours with the one at bar. After stating the facts, the court says: "We

see no ground upon which the action could be maintained. There was no contractual relation whatever between appellant and respondent with respect to the money sued for. . . . The judgment and lien created by the tax on respondent's second mortgage interest had been satisfied and removed by the sale to the state. (Pol. Code, sec. 3716.) The money paid by the appellant to the state was not for the benefit of the respondent, whose entire interest in the property had been first taken by the state for taxes, and afterwards had again been entirely swept away by the judgment of foreclosure. The appellant is in no different position from that of any other purchaser of land who finds his title clouded." This case contains a clear interpretation of the constitutional provision under consideration and we are not at all inclined to either overrule or modify it, and this disposes of the case now before us.

The judgment appealed from is affirmed.

McFarland, J., Henshaw, J., Angellotti, J., concurred.

SHAW, J., dissenting.—I dissent. The facts briefly stated are, that plaintiff held a senior mortgage on lands on which the defendant held a junior mortgage; that the land was valued for taxation high enough to cover the mortgage interest of both mortgagees for the years 1898 and 1899; that in May, 1898, the plaintiff began suit to foreclose his mortgage, and in due course of proceedings purchased the land at foreclosure sale, and obtained a sheriff's deed on April 15, 1899; that in the mean time the taxes assessed on the mortgage interest of the defendant in the land for 1898 and 1899 had not been paid, and the plaintiff, in order to prevent the sale of his land therefor and protect his property, was compelled to pay the tax for 1899 after it became delinquent, and to redeem a sale to the state for the defendant's taxes for 1898. The action was to recover of the defendant the sums thus paid for taxes. Under the provisions of the constitution and section 3627 of the Political Code the mortgage interest of the mortgagee in lands is to be considered as an estate therein the same as any other interest in property.

The principle upon which the action was based is as old as the common law. It is stated and approved as follows in *San Gabriel etc. Co. v. Witmer etc. Co.*, 96 Cal. 635: "Where the

plaintiff, either by compulsion of law, or to relieve himself from liability, or to save himself from damage, has paid money, not officiously, which the defendant ought to have paid, a count in *assumpsit* for money paid will be supported." "In such case the law implies a request on the defendant's part, and a promise to repay, and the plaintiff has the same right of action as if he had paid the money at the defendant's express request. The right of contribution or reimbursement for money necessarily paid for another's benefit does not necessarily depend upon contract, but may arise from the equity of the case." In equity the same principle is the foundation of the doctrine of subrogation. "The general rule is, that any person having an interest in property on which there is a lien or encumbrance, may, if necessary for his own protection, pay off the same and be substituted to the rights and remedies of the holder thereof." (27 Am. & Eng. Ency. of Law, 2d ed., p. 235.)

The principle is so well established that it seems useless to cite authorities, but the following examples may elucidate the proposition. *Hogg v. Longstreth*, 97 Pa. St. 255, is substantially the same as the case at bar. The plaintiff, a mortgagee, had purchased the land at the foreclosure sale, and afterwards, in order to protect his land from sale for taxes, was compelled to pay certain taxes assessed against the land while it was held by a purchaser from the mortgagor. It was held he could recover in *assumpsit* from the grantee of the mortgagor the amount of the taxes thus paid. In *Graham v. Dunnigan*, 6 Duer, 629, it was held that a tenant for life of a part, having been compelled to pay the taxes against the whole property, can recover of the other owners their proper proportion of the taxes thus paid. There was, of course, no contractual relation between the tenants with respect to these taxes, and it was further decided that such relation is not necessary to support the action. In *Goodnow v. Moulton*, 51 Iowa, 557-558, the plaintiff, in the belief that he owned the land, had paid the taxes thereon during litigation with the real owner as to the title. The real owner had not paid the tax, nor had he caused it to be assessed in his name. There were no contractual relations between the parties. It was held that the plaintiff could recover of the real owner the taxes thus paid. Where, by operation of law, A is compelled to pay a

debt, which in equity and good conscience B should have kept from being claimed, A may recover of B the amount so paid. (*Ticonic Bank v. Smiley*, 27 Me. 225.¹) The following authorities are to the same effect: *Nutter v. Sydenstricker*, 11 W. Va. 535; *Bailey v. Bussing*, 28 Conn. 455; *Nichols v. Buchnam*, 117 Mass. 488; *Kemp v. Cossart*, 47 Ark. 62; *Blythe v. Luning*, 7 Saw. 506; 14 Fed. 281; *Taylor v. Porter*, 7 Mass. 355, (in which there was a mortgage on two parcels sold to different persons, one of whom paid all and recovered half of the other); 2 Greenleaf on Evidence, sec. 114; 35 Century Digest, cols. 44, 48. This principle was applied in *San Gabriel etc. Co. v. Witmer etc. Co.*, 96 Cal. 635, and that case was followed in *Angus v. Plum*, 121 Cal. 608.

I can see no point lacking in the facts of this case that would be necessary to bring it within the rule of the foregoing authorities. 1. The plaintiff was compelled to pay the taxes in order to protect his own property. 2. The taxes were the personal obligations of the defendant. "Every tax has the effect of a judgment against the person." (Pol. Code, sec. 3716.) In *People v. Seymour*, 16 Cal. 343,² it was expressly decided that a tax is a debt, and that when a tax is duly assessed the owner of the property becomes personally liable, and may be sued therefor in all cases when there is a statute authorizing such suit. To the same effect is *Oakland v. Whipple*, 39 Cal. 115. There is a statute authorizing such suit. The statutes of 1880 (p. 136) provide that any county, or city and county, "may sue in its own name for the recovery of delinquent taxes, whether the same be for county, or city and county, and state purposes, or either of them." In *Los Angeles County v. Ballerino*, 99 Cal. 595, this statute was said to be still in force, and it was held that under its provisions a county could sue a taxpayer to recover the taxes delinquent. 3. Being debts, or at least personal obligations, of the defendant, it follows that he ought to have paid them, and that under the act of 1880 he was liable to a suit by the county to recover them, and hence the payment by the plaintiff, in a legal sense, inured to the benefit of the defendant. It was the duty of the defendant to pay the tax on his property, and this duty was performed by the plaintiff under

¹ 46 Am. Dec. 593.

² 76 Am. Dec. 521, and note.

compulsion. The fact that with respect to the taxes of 1898 there had been a sale to the state before the plaintiff made payment is not material. The right of the plaintiff to be subrogated to the rights of the state includes the right to be subrogated to all the remedies which the state originally had against the taxpayer. 4. Moreover, it cannot be said from the facts of this case that the second mortgagee suffers any hardship by being compelled to pay the taxes in question. The presumptions of law are in favor of the plaintiff. The mortgage debtor is presumed to be solvent, and there was nothing in the record here to show the contrary. Therefore, the valuable element of the property upon which the taxes were assessed—namely, the debt due from the mortgagor to the second mortgagee—is presumed to be, even at the present time, worth the amount thereof, owing to the solvency of the debtor. Under the ruling of the majority, the second mortgagee will secure the payment of his taxes by another, without any liability on his part to repay them

The opinions in *McPike v. Heaton*, 131 Cal. 109,¹ and *Canadian Co. v. Boas*, 136 Cal. 420, are clearly inconsistent with the above principles, and also with *Angus v. Plum* and the *Witmer* case, and both of these cases proceed on erroneous lines. *McPike v. Heaton* rests on two propositions: 1. That *McPike* was the second grantee, and that there was no covenant running to him from the person against whom the taxes were assessed, or, in other words, that there was no contractual relation between the plaintiff and defendant; and 2. That as "there is no personal obligation upon the owner of land for the taxes levied against it, . . . the defendant was under no personal liability for the taxes paid by the parties," and hence it was said *San Gabriel etc. Co. v. Witmer etc. Co.*, 96 Cal. 635, did not apply. In the *Boas* case the same propositions were made as the foundation for the decision, and it was put on the ground that the money paid by the plaintiff was not for the benefit of the defendant, because of this absence of personal liability. The answer to both of these points is clear from the foregoing authorities. There was a personal liability, and the tax paid by the plaintiff was necessary to remove a burden upon the plaintiff's land, arising from the neglect of the defendant to discharge his obligation to the

¹ 82 Am. St. Rep. 335.

state. The payment discharged his obligation and operated directly to his benefit.

If the defendant should show in his defense that the mortgagor was insolvent, that he had no other security, and, consequently, that his whole estate in the premises and right to the debt had been swept away and destroyed by the foreclosure of the first mortgage, and substantially merged therein, I think the same principles of justice and equity upon which the plaintiff depends would then be operative in aid of the defendant, and would require judgment in his favor. But he should be required to show this, and not have it presumed in his favor.

[Sac. Nos. 942, 943, 944. In Bank.—October 3, 1904.]

JAMES BEN ALCORN et al., Appellants, v. HENRY BRANDEMAN, Respondent, (Case No. 942); C. A. HOWARD, Respondent, (Case No. 943); and E. GIESEKE, Respondent, (Case No. 944).

ACTION TO QUIET TITLE—SUFFICIENCY OF COMPLAINT—JUDGMENT UPON DEMURRER—CASE AFFIRMED.—The complaints involved upon each of the present appeals being substantially the same and involving the same question as the complaint which was held sufficient to warrant reversal of a judgment upon demurrer in the case of *Alcorn v. Buechke*, 133 Cal. 655, that case is affirmed and applied in reversal of the judgments upon demurrer here involved.

Id.—VOID DECREE OF PARTIAL DISTRIBUTION—PETITION BY ADMINISTRATOR—QUESTION AS TO ESTOPPEL NOT PRESENTED UPON DEMURRER.—Where the complaint set forth a decree of partial distribution upon partition of the administrator, which is void, and which was set up solely as one of the sources of the defendants' claim of title alleged to be without right, and alleged that the plaintiffs neither authorized nor were cognizant of them, and never consented, agreed to, or approved thereof, and does not allege that plaintiffs took under the decree, the question whether they were estopped by taking thereunder from questioning its validity is not presented upon the demurrer, and can only be raised by appropriate pleading and proof.

Id.—TITLE OF ADMINISTRATOR AS HEIR—QUESTION INVOLVED NOT GOING TO SUFFICIENCY OF COMPLAINTS.—Where the plaintiffs derive title to two thirds of the property from other heirs, and as to one

third thereof by conveyance from the administrator as an heir, questions which may arise as to the effect of the decree of partial distribution had at the administrator's request, upon his own interest, and as to whether the petition and decree did not operate as a ratification of a deed under the power of attorney involved in the cases, do not affect the sufficiency of the complaints as to the other two thirds of the property, and the demurrers thereto were improperly sustained.

APPEALS from judgments of the Superior Court of San Joaquin County. Edward I. Jones, Judge.

The facts are stated in the opinion of the court in this case, and in the case of *Alcorn v. Buschke*, 133 Cal. 655.

John B. Hall, and J. F. Ramage, for Appellants.

S. M. Spurrier, and A. C. White, for Respondents.

LORIGAN, J.—The appeals in all these cases are taken from judgments on demurrers to the complaints, the plaintiffs declining to amend, and, in the main, no different questions are presented now than were submitted and disposed of in the case of *Alcorn v. Buschke*, 133 Cal. 655, wherein the complaint, except as to the names of the defendants and the descriptions of the property, was identically the same as those now challenged on these appeals. The allegations of the complaint, the grounds of attack upon it, and the conclusion of the court thereon, are set forth fully in the opinion in that case, and discussion of them here is unnecessary. (In the opinion in that case, as reported, there are two errors in dates. The deed from Seabee to the plaintiffs was June 6, 1900, instead of June 6, 1890, as stated, and in the first paragraph on page 657 the date of the deed by Kyle, as attorney in fact to Jennings, stated as October 17, 1896, should be June 26, 1896.)

It is contended, however, by respondents that one point is advanced by them on these appeals which was not presented or passed on in the above case. This is relative to the effect of a decree of distribution, the general terms of which are set forth in the complaint.

The plaintiffs sue as heirs at law and as grantees of one Seabee, the remaining heir at law of one McKinney, who died intestate, seized of the property mentioned in the complaint

and other property. Pending the administration of such estate, Sebree, who was administrator thereof, petitioned for a partial distribution of the estate, which was granted, the decree distributing to the defendants' predecessor the land described in the complaint, and to the plaintiffs and Sebree, as heirs at law of the decedent, other lands of the estate.

Notwithstanding this court held in *Alcorn v. Buschke*, 133 Cal. 655, that such decree was void for the reasons therein stated, still it is now insisted by respondents that it nevertheless appears from the allegations of the complaint, as they construe them, that the plaintiffs are estopped by their own conduct, and the conduct of Sebree, from questioning the validity of the decree and asserting title to the premises in dispute which the defendants claim under it.

In this regard it is claimed that they are especially estopped from asserting claim, under the deed from Sabree to them, of his one-third interest in the property as heir at law, because of Sebree's conduct in petitioning for and obtaining the decree of distribution of the particular land in dispute in favor of defendants' predecessor in interest, under whom defendants claim, and of which action and conduct on Sebree's part they had full notice and knowledge when they took the conveyance from him.

And that as to the original interest—two thirds—which plaintiffs claim as heirs at law of McKinney, respondents insist that as it equally appears from the complaint that plaintiffs actually took under the decree the other lands of the estate particularly distributed to them, and took advantage of and enjoyed the benefit which the decree gave them in that respect, they are estopped from now questioning its validity as to the interest acquired to the land in dispute by the respondents under the same decree; that they could not accept the decree in as far as it conferred advantages on them, and repudiate it as far as it attempted to confer advantages on others; that they must elect to be bound by it in its entirety or reject it in its entirety, and having elected to accept the benefits it conferred on them, are estopped to dispute defendants' rights under it, or to now question its validity.

As far as concerns the interest which the plaintiffs acquired to the lands in dispute under their conveyance from Sebree, a question may arise, not only as to the effect of the decree

of partial distribution, obtained at his request, upon whatever interest he might have had in the property distributed to respondents' predecessor under it, but whether his petition asking for such distribution to defendants' predecessor in interest and the distribution under it, did not operate as a ratification of a deed made by one Kyle under the power of attorney set forth and discussed in *Alcorn v. Buschke*, 133 Cal. 665.

This would not, however, of itself affect the sufficiency of the complaint in the cases now under consideration, because, independent of the one-third interest which plaintiffs claim to have acquired from Seabee, as heir of McKinney, the complaint would still be sufficient to support their claim as heirs at law of the said decedent for the other two thirds of the land described in it, unless the point made by defendants that they are estopped by the decree of distribution can be availed of on the face of the complaint, and we do not perceive that it can.

While the complaint sets forth in general the proceedings for distribution, and shows that distribution of the land in question was made to respondents' predecessor in interest, and that other lands were distributed under it to plaintiffs and Seabee, there is nothing whatever to indicate that the plaintiffs actually took any lands under said decree, or derived any advantage or benefit under it. The proceedings in partial distribution were averred by plaintiffs, in their complaint to quiet title, solely as being one of the sources of respondents' claim of title to the property in question, and which proceedings they alleged were totally void; that they neither authorized nor were cognizant of them, and never consented, agreed to, or approved of the object thereof.

Under these circumstances the benefit of the rule of law which respondents contend for is not available to them upon the face of the pleading. If the facts (which they incorrectly infer are all set forth in the complaint, and upon which assumption they make the claim of estoppel) exist, they will have an opportunity of availing themselves of the rule of law contended for, by appropriate pleading and proof.

This additional point now urged on these appeals being without present merit, and as all the other points made to sustain the judgment have heretofore been disposed of as

versely to respondents in the case of *Alcorn v. Buschke*, 133 Cal. 655, the judgments in the three above-entitled causes are reversed, and they are remanded, with directions to the lower court to overrule the demurrers interposed in each case.

Henshaw, J., Shaw, J., Angellotti, J., McFarland, J., and Van Dyke, J., concurred.

Beatty, C. J., dissented.

[Crim. No. 969. In Bank.—October 8, 1904.]

THE PEOPLE, Respondent, v. CHARLES COULTER,
Appellant.

CRIMINAL LAW—BURGLARY—DEGREE OF OFFENSE—SUFFICIENCY OF EVIDENCE—BILL OF EXCEPTIONS—REVIEW UPON APPEAL.—Where the defendant was convicted of the crime of burglary in the second degree, and the only question raised upon appeal is as to whether the verdict is contrary to the evidence, and the judgment-roll and bill of exceptions show affirmatively that the bill of exceptions does not contain all the evidence, and the bill of exceptions purports only to state that the testimony given at the trial included evidence directed solely to the time of the offense, and tending to show burglary of the first degree, other questions as to the insufficiency of the evidence to support the verdict are not raised, and cannot be reviewed upon the appeal. [Beatty, C. J., Henshaw, J., and Lorigan, J., dissenting.]

ID.—VERDICT FAVORABLE TO DEFENDANT.—The defendant cannot complain that the verdict was more favorable to him than the evidence warranted.

ID.—PRESUMPTIONS AS TO EVIDENCE IN BILL OF EXCEPTIONS.—Though the general rule is, that the bill of exceptions is presumed to contain all of the evidence, even if it does not so state, where it purports to give the substance of the evidence, or what it tends to show; yet this rule does not apply where the bill by its terms is limited to the statement of a portion of the material evidence included in the testimony given at the trial. In such case the presumption is only as to the completeness of the record as to the evidence upon the particular matter to which by its terms the bill is limited; and it must be presumed that the omitted evidence was sufficient to sustain the verdict of the jury in all other respects. [Beatty, C. J., Henshaw, J., and Lorigan, J., dissenting.]

12.—BURDEN UPON DEFENDANT—DUTY OF DISTRICT ATTORNEY.—Where the defendant's motion for a new trial is denied, it devolves upon him to present a draft of a bill of exceptions purporting, at least, to contain a fair statement of the evidence material to the question which he desires to have determined upon appeal. Though it is the duty of the district attorney to see that the evidence is complete as to all such matters, it is not his duty to prepare a bill of exceptions; and his duty is confined to proposing such amendments in regard to the particular matter set forth in the bill as will show the truth as to those matters. [Beatty, C. J., Henshaw, J., and Lorigan, J., dissenting.]

13.—PREPARATION OF BILL OF EXCEPTIONS—DUTY OF JUDGE.—A bill of exceptions need not in any case state all of the evidence word for word. As to those matters concerning which there is no dispute, the bill should merely contain the briefest statement as to its effect; and as to the matters as to which the dispute exists, the statement should be sufficiently elaborate to show the facts. It is the duty of the judge settling the bill to strike out all unnecessary matter, and to see that it is no more lengthy than the necessities of the case require.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

H. H. McCloskey, for Appellant.

U. S. Webb, Attorney-General, for Respondent.

ANGELLOTTI, J.—The defendant was convicted of the crime of burglary of the second degree and adjudged to suffer imprisonment in the state prison for three years. He appeals from the judgment and from an order denying his motion for a new trial.

The motion for a new trial was made upon several grounds, one being, "That the verdict is contrary to the evidence." This is the only ground relied on upon this appeal, counsel for defendant stating in his brief that the venue was not shown, the date of offense was not shown, the ownership of the property entered or of the property taken was not proven, the right of the defendant to take the articles was not questioned, and that no wrongful intent was shown.

An examination of the bill of exceptions discloses the fact

that the bill does not purport to state all the evidence. So far as applicable to the questions involved in this appeal, it is as follows, viz. :—

“The opening statement was made by the district attorney, and witnesses were then sworn and examined on behalf of the people, and the people rested.

“Witnesses for the defendant were then sworn and examined and the defendant rested.

“Witnesses were then sworn and examined in rebuttal.

“Whereupon the testimony was closed.

“The testimony given during the trial included the following:—

“Joseph Catania testified as follows:—

“‘Q. About what time in the morning was it when you heard this glass crack, you think?

“‘A. It was just about exactly ten minutes to five.’

“The witness further testified that not more than two or three minutes after he saw the defendant put a wire through the window, pull out articles and hand them to another man.

“George C. Douglass, the police officer who arrested the defendant, testified that it was about twenty-five minutes past five when Catania ran up to him and told him about the burglary.

“When the testimony was all in the cause was argued and submitted by the respective counsel.”

The copy of the minutes of the trial contained in the judgment-roll shows that three witnesses were sworn and examined on behalf of the people, twelve witnesses on behalf of the defendant, and five witnesses for the people, in rebuttal.

It is apparent that there was no attempt to state in the bill of exceptions the evidence given upon the trial, and that the only object of inserting the particular portion set out was to point out some particular error relied on, and claimed to be an error *by reason of that particular testimony*. A bill of exceptions must contain so much of the evidence only as is necessary to present the questions of law upon which the exceptions were taken (Pen. Code, sec. 1175), and *where it is made to appear affirmatively* that only a portion of the material evidence is included, and that there has been no attempt to state anything about the nature of the omitted evidence or its effect, it is clear that the portion inserted is

so inserted for another purpose than that of supporting the claim that the verdict is contrary to the evidence in some other respect than that as to which the inserted evidence is applicable.

It will be observed that the inserted evidence is directed solely to the question of time, the substance thereof being that it was not later than a few minutes after five o'clock A. M. when the burglary was committed. It may well be that, under the authorities, it will be presumed that the inserted evidence was all the evidence introduced on the question as to the time of the commission of the offense, and, therefore, as to whether the burglary was of the first or second degree. The crime being alleged to have been committed on the fourteenth day of February, 1902, this evidence showed a burglary committed between sunset and sunrise, which was a burglary of the first degree, while the verdict was that the defendant was guilty of burglary of the second degree only. The only claim really presented by this bill of exceptions is, that by reason of the fact that all of the evidence given upon the question of time showed that the defendant was guilty of the more serious offense of burglary of the first degree, instead of the lesser offense of burglary of the second degree, of which he was convicted, the verdict was "contrary to law or evidence." It is well settled that a defendant cannot complain where the determination of his case was more favorable to him than the evidence warranted (*People v. Muhlner*, 115 Cal. 303, and cases there cited), but we can conceive of no other reason for the statement that the evidence given included the portion inserted as to time, than the desire to present on this appeal the question as to whether the evidence as to time was such as to render the verdict contrary to the evidence. We adhere to the rule declared in *People v. Muhlner*, 115 Cal. 303, and other cases, and can therefore see no reason why the fact that the evidence as to time was as stated in the bill of exceptions, renders the verdict contrary to the evidence.

The claim of defendant's counsel now appears to be, that where a defendant has specified as one of the grounds of his motion for a new trial that the verdict is contrary to the evidence, without specifying either in his motion or in his bill of exceptions the particulars wherein the evidence is claimed to be insufficient, this not being necessary in criminal cases, it

will be conclusively presumed on appeal that the bill of exceptions contains the substance of the evidence as to *every fact put in issue by the information or indictment and the plea of not guilty*, unless it be stated that facts concerning which no evidence is inserted were proven, or that evidence was introduced tending to prove them.

The true rule does not, we are satisfied, go to the extent claimed by counsel. Where the trial court denies the motion of a defendant for a new trial, it devolves on him, if he wishes to have the action of the court reviewed on appeal, to present the draft of a bill of exceptions purporting, at least, to contain a fair statement of the evidence material to the determination of the questions desired to be determined on appeal. Although he may have specified in his motion insufficiency of the evidence as one of his grounds for a new trial, there is no law requiring him to further press this ground on appeal after the ruling against him by the trial court, and in the great majority of cases it would be useless to so do, in view of the well-settled rule that the appellate court will not disturb the action of the trial court as to matters concerning which there was simply a conflict of evidence. If, therefore, notwithstanding the statement of that ground in his motion, he should after the denial of his motion present a bill of exceptions containing absolutely no evidence, and the bill of exceptions presented to the appellate court contained no evidence or any reference thereto, except a statement that witnesses were sworn and examined, there would be no presumption that there was in fact no evidence given on the trial. The presumption would rather be, that the defendant had abandoned this particular ground for a new trial, and that all reference to the evidence had therefore been intentionally omitted. The presumptions are all in favor of the correctness of the action of the trial court, and it is not to be presumed that such court has refused to allow the insertion of such evidence as the defendant may have desired, so far as the same is necessary to the determination of any question sought to be presented on the appeal. It would not be incumbent on the district attorney in such a case to propose amendments in order to make the bill show the evidence. It is not for him to prepare a bill of exceptions for the defendant. His duty is confined to proposing such amendments *in regard to the mat-*

ters set forth in the bill as will make the bill show the truth as to those matters.

And so when the bill proposed by the defendant *in terms purports* to give the evidence as to only one matter or issue out of many, and is expressly confined to that purpose, as we think it is in the case at bar, there can be no presumption arising from the absence from the bill of evidence on the other issues that there was in fact no evidence thereon. In such a case the presumption is only as to the completeness of the record as to the evidence upon the particular matter to which, by its terms, the bill is limited.

If, on the other hand, the proposed bill can be said to fairly purport to give the substance of the evidence in the case, or to state what the same tended to show, the matter of the insufficiency of the evidence to sustain the verdict is presented, and the district attorney must see that the bill truly presents the actual condition as to the evidence on all the issues, for under the authorities it will be presumed on appeal that the bill of exceptions does contain all the evidence, even though there be no statement therein to the effect that no other evidence was given. The true rule, we are satisfied, goes no further than this. In this state it is not essential that the bill should in terms state that the evidence contained therein was all the evidence given. It is enough to raise the presumption that it does contain all the evidence that the bill on its face fairly purports to state the evidence or its effect. But there can be no good reason for a rule establishing a conclusive presumption to the effect that a bill of exceptions does contain all the evidence in a case simply because insufficiency of evidence was one of the grounds specified in the motion for a new trial, where the bill affirmatively shows that the fact is otherwise, and that it does not contain all the evidence, and the rule invoked by defendant's counsel has never been held to include such a case. All that was said in the three cases principally relied upon by defendant was said with reference to cases very different from this, and the language used therein by this court must be read in connection with the facts of those cases. In *People v. Fisher*, 51 Cal. 319, it fully appears from the opinion that the bill of exceptions did purport to contain the evidence, for it stated that the several witnesses testified in substance as therein stated. There was nothing in

the bill from which it could be reasonably inferred that there was other evidence. It was in reply to the contention of the attorney-general that, in the absence of an affirmative statement that there was no other evidence, it must be presumed, in accordance with the rule that formerly prevailed in several states, that there was such evidence sufficient to support the verdict, that the opinion of the court was directed, and the language there used cannot be held applicable to a case where the bill affirmatively shows that it does not state all the evidence or the effect thereof.

In *People v. Buckley*, 116 Cal. 146, the record shows that the bill did purport to give the substance of the testimony of each witness, and the statement of evidence constituted over seventy-five pages of the transcript, ending with the words, "This closed the testimony."

In *People v. Griffith*, 122 Cal. 214, over fifty pages of the transcript consisted of evidence, and it was stated at the end that "This was all the evidence."

These cases bear no analogy to the case at bar. This is a case where the record shows affirmatively that there was evidence, presumably material, that is not contained in the bill, and in support of the action of the trial court it must further be presumed that such evidence so omitted was sufficient to sustain the verdict of the jury. The mere fact that the evidence as to the time of the commission of the offense was as stated in the bill, which is under our views the only point made by the insertion of the portion of the evidence contained therein, would not warrant the granting of a new trial.

The judgment and order are affirmed.

Shaw, J., McFarland, J., and Van Dyke, J., concurred.

DISSENTING OPINION.

(Filed October 20, 1904.)

BEATTY, C. J.—I dissent. Aside from the special importance of this appeal to the defendant, the case is of general importance on account of the question of practice which it involves—a question destined apparently never to reach a definite settlement in this court. There is no doubt that a defendant in a criminal case who has moved for a new trial on the ground that the verdict is contrary to the evidence is

entitled to a reversal of the order denying his motion when it appears by the record on appeal that there was a total failure of proof as to any material allegation of the indictment or information. But there has long been a question as to the method by which the record in such case can be made to show the failure of proof. In civil cases a party moving for a new trial on the ground that the verdict or other decision is contrary to the evidence (except when he moves on the minutes of the court) must prepare a statement or bill of exceptions as a foundation for the motion, and must specify therein the particular findings, or, in case of a general verdict, the particular issues, as to which he claims that the decision is contrary to the evidence. If he neglects to make such specification, his motion as to this ground fails; but if he makes a sufficient specification, it devolves upon the party resisting the motion to see to it that the proposed statement or bill of exceptions is, if necessary, so amended before settlement as fairly to show all the evidence in support of the finding or verdict. And on appeal the presumption is, that there was no evidence given at the trial upon the controverted issues, except that which is contained in the settled statement or bill of exceptions. The propriety, convenience, and economy of this rule in civil cases is universally recognized, and there is no reason why the same rule should not obtain in criminal cases so far as it can be made applicable in view of the different order of procedure prescribed in moving for a new trial. In civil cases the motion is made after judgment; in criminal cases it must be made before judgment and without any settled statement or bill of exceptions, so that the only specification of particular allegations respecting which it is claimed that the proof has failed are such as counsel may make in the course of his oral argument. It would have been a wise provision if the statute had required the defendant in proposing a bill of exceptions to the order denying his motion to specify the particular allegation or allegations of the indictment or information which he claimed to be unsupported by the evidence; for then the district attorney would have had the same guide in proposing amendments to the bill that the resisting party has in civil cases, and the justice and propriety of applying to the settled bill the same presumption that attaches in civil cases would have been unquestioned. But,

unfortunately, no such provision has ever been made, and since the verdict may be attacked in this court upon any ground the defendant may select, it devolves upon the district attorney, according to one line of decisions, to see that the proposed bill is, if necessary, so amended as to contain some evidence, if evidence there was, sufficient to support the verdict upon every material issue. These decisions, it will be seen, bring the practice into close analogy with the practice in civil cases, and are founded upon the doctrine that when the motion for a new trial is based upon an alleged failure of the evidence, the presumption here is, and ought to be, that if the settled bill of exceptions contains no evidence tending to prove a material allegation of the indictment, then that there was no such evidence. The principle of these decisions is the same that in the law of evidence imposes the burden of proof upon the party holding the affirmative of the issue. Another line of decisions reverses this principle in its application to this particular matter of procedure, and imposes upon the defendant the task of demonstrating by the record the negative proposition that there was no evidence to support one or more of the material allegations of the indictment or information, and is based upon the doctrine that in this court the presumption is, and ought to be, that there was abundant evidence given at the trial to support the verdict, although none is contained in the record, unless it is affirmatively shown by the bill of exceptions that it contains all the evidence.

It may be conceded that the language of the statute affords as much support to either of these conflicting lines of decision as it does to the other, and it may also be true that either rule, if consistently maintained, would protect the rights of defendants. But when counsel, in reliance upon recent and deliberate decisions of the court reviewing and commenting upon previous and conflicting decisions, has brought himself within the protection of the rule first above stated, we are not justified in denying his appeal upon the ground that the bill of exceptions does not respond to the test which we have discarded.

It is not, however, on account of the particular injustice which in my opinion this defendant has suffered in consequence of the changed views of the court, that I feel compelled to give full expression to the reasons for my dissent.

The more important consideration, as regards the public, is, that in a mere matter of procedure, where a rule once established should be adhered to unless its enforcement is found to involve grave inconvenience, we are by this decision discarding a plain, simple and convenient rule, and substituting in its place one difficult of comprehension, more difficult of application, productive of increased trouble and delay in the disposition of criminal causes, and of increased expense to the counties of the state. For what is the test now prescribed for determining whether there was a failure of evidence as to a material allegation of the charge? "It is not essential," the court say, "that the bill should in terms state that the evidence contained therein was all the evidence given. It is enough to raise the presumption that it does contain all the evidence that the bill on its face fairly purports to state the evidence or its effect." This, then, is the test of sufficiency for future cases. The old rule which required the bill to show expressly that it contained all the evidence—a rule which at least had the merit of simplicity and certainty—is abandoned, and in its place is substituted the requirement that the bill must on its face *fairly purport* to state the evidence or its effect. But when will a bill fairly purport to state the evidence or its effect? The criterion proposed is as uncertain as the length of the chancellor's thumb, and if a bill stops short of an explicit statement that it contains all the material evidence, there will be varying opinions, according to the composition of the court, as to what it fairly purports to contain. Some way or other, however, the bill must be such as to induce the presumption that it *contains all the evidence*, and since counsel generally prefer to leave nothing to chance that can easily be made secure, the practice hereafter will be to put in all the evidence, in order to insure the insertion at the end of the bill of the old formula, "The foregoing was all the material evidence introduced at the trial," or some statement equally explicit. In short, we shall have fallen back into the old rut from which an adherence to the decision in *People v. Fisher*, 51 Cal. 319, would have extricated us, and we shall have hereafter the same inordinately bulky records that have afflicted the court for so many years, with all their attendant inconvenience to the parties and expense to the counties of the state for copying, printing, etc.,

and the consequent delay in bringing up the record for review.

And what is the reason to be gathered from the opinion of the court for this abandonment of a plain and simple rule, based upon a reasonable presumption, in favor of a rule so vague and uncertain, and necessarily involving the mischievous consequences which years of experience have taught us are entailed by a practice based upon the opposite presumption?

Partly, it would seem, the present opinion of the court, like the opinion in Department, is based upon the assumption that the bill of exceptions as it appears in the record before us is purely the work of defendant's counsel. It is spoken of as his bill, and its assumed deficiencies—attributed in the Department opinion to an attempt on his part to throw upon the district attorney the labor of putting into the bill the evidence which it was his duty to have set forth in the draft as proposed by him—are now accounted for on the supposition (unwarranted, I think) that it was prepared for the sole purpose of presenting a point which counsel have never made,—the point, that is to say, that a conviction of burglary in the second degree cannot be upheld in view of testimony showing that it was committed between sunset and sunrise.

It ought not to be necessary to call attention to the fact that a settled bill of exceptions is the result of the joint efforts of counsel for defendants, the district attorney, and the trial judge. It may contain no part of the bill as proposed by the defendant,—it may contain more or less than the defendant's draft. It is not what he states, but what the court states, to have been the evidence bearing upon the several exceptions reserved.

But conceding that it may have been the intention of counsel to urge in this court the absurdly untenable proposition with reference to which the court supposes the bill was framed, it still does not follow that it was the only point upon which he was relying for a reversal. On the contrary, the district attorney and the trial judge were plainly informed by the only means known to the law that he was also relying upon the point that the verdict was contrary to the evidence, and if he wholly failed to set out any of the evidence which tended to support the verdict he was clearly within his rights

in omitting to do so, according to the very latest decisions of this court bearing upon the point.

In *People v. Fisher*, 51 Cal. 319, in which the court considered and construed the provisions of the Penal Code relative to the settlement of bills of exceptions, the ground of the decision was thus stated: "The presumption in this court is that there was no evidence introduced in support of a fact in issue, unless the bill of exceptions contains the substance of the evidence introduced to prove the fact, or states that the fact was proven, or that evidence was introduced tending to prove it." And the rule based upon this statement of the presumption attaching to bills of exceptions, was laid down in accordance with its principle,—the principle, that is to say, which in the law of evidence imposes the burden of proof upon the party holding the affirmative of the issue. In conformity to this principle it was declared to be the duty of the district attorney, when the ground, or one of the grounds, of the motion for a new trial was insufficiency of the evidence, to have a statement inserted in the bill of exceptions that the facts as to which there was no controversy were proven, with the substance of the evidence as to the controverted facts,—or sufficient of the evidence to establish them *prima facie*, which is all that is necessary in a criminal case to prevent a reversal in this court. And the opinion of the court pointed out how easily, and in what little space, a perfect case for the people could be put into the record if the case had in fact been proved. The opinion of the court recognized the fact—familiar to all—that the controversy in regard to the sufficiency of the evidence is usually confined to some one or two facts,—the venue, for instance,—and that as to other facts it is sufficient to state in three words that they were proven, while as to the controverted facts it properly devolves upon the district attorney to have inserted in the bill enough of his evidence to sustain the verdict. It was plain, also, that the practice thus enjoined, if conformed to, would not only shorten the statement of the evidence and lessen the expense of copying and printing, but would lighten the task of the district attorney and the trial judge, as well as the counsel for the defendant. This wise and commendable decision was followed in *People v. English*, 52 Cal. 211, and then it appears to have been forgotten. A new court came in with the

new constitution, and *People v. Fisher* and *People v. English*, without citation or reference, were silently overruled by a reversion to the old rule as stated in *People v. Williams*, 45 Cal. 25, and quoted in the Department opinion in this case. (See *People v. Leong Sing*, 77 Cal. 117; *People v. Carroll*, 80 Cal. 153; *People v. Tonielli*, 81 Cal. 279.) But when the attention of the present court was again called to the *Fisher* and *English* cases, and to the manifest advantages of the rule of practice which they enjoined, we gave them our unequivocal indorsement. (See *People v. Buckley*, 116 Cal. 146, and *People v. Griffith*, 122 Cal. 214.) An attempt is made in the opinion of the court to distinguish these cases by arguing that the bills of exceptions, as contained in the several records, covered a large number of pages, and fairly purported to contain all the evidence. But this ignores the principle of those decisions. If they had been based upon the doctrine here asserted, that the bill must demonstrate that there was no evidence given at the trial to prove the material allegations of the charge, it would have been necessary for the court to dispose of the contention of the attorney-general that the record did not purport fairly, or otherwise, to contain all the evidence. It will be seen, however, by reference to the several opinions, that they put this argument aside as having no bearing upon a conclusion founded solely upon the doctrine that, when the ground of the motion for a new trial is failure of proof, it is the duty of the district attorney to make the record show that he proved his case, if in truth he did prove it. The difference between the record in this case and the records in the *Fisher*, *English*, *Buckley* and *Griffith* cases does not therefore constitute a ground of distinction. They were decided upon a principle which had no regard to this supposed difference—a principle utterly inconsistent with the present decision, which affirms a conviction upon a record which admittedly contains no evidence to sustain the material allegations of the charge.

It remains only to notice the point so strongly insisted upon in the Department opinion, and restated in the present opinion of the court, that the defendant cannot be allowed in cases like this to shirk the duty of setting forth in his draft of the proposed bill the substance of the evidence given at the trial, and thereby impose upon the district attorney the burden of

preparing a bill for him. This ground of the decision totally ignores what is so clearly shown in the opinion of the court in *People v. Fisher*, 51 Cal. 319, that the task thus imposed upon the district attorney is the lightest possible. There is in fact no course that the defendant could possibly pursue which would impose so little labor on the district attorney and trial judge in a case of this character as to propose a bill of exceptions containing not one word of the evidence given at the trial. It would save them the reading and comparing and correcting of the long and redundant statement to which we are accustomed,—requiring hours of their time and attention,—and impose upon them the comparatively trivial task of drafting an amendment which could easily, in any ordinary case, be compressed into a single page of manuscript in five minutes' time. Take the present case as an illustration, and suppose the defendant's draft of the bill to have been as meager as the settled bill in the record. It could have been read through almost at a glance, and if in truth the charge was proved, as alleged in the information, an amendment in the following words would have made an invulnerable case: George H. Kahn, a witness for the people, testified: On the 13th and 14th of February last I was the proprietor of the store known as 201 Kearny Street, in the city and county of San Francisco, and owned the articles in the show-window. During the night of February 13th-14th that show-window was broken and various articles stolen therefrom (describing them). Joseph Catania, a witness for the people, testified: On the morning of February 14, 1902, I was standing near the show-window of the store at 201 Kearny Street in this city, and at about five o'clock heard the glass crack. A minute or two later I saw this defendant put in a wire, abstract several articles, and hand them to another man. The two then ran away. Compare the labor of the district attorney in preparing this amendment and of the judge in acting upon it with the task that would have been imposed upon them if the course enjoined upon counsel for defendant by the opinion of the court had been pursued,—if, in other words, the substance of the testimony of the twenty witnesses shown by the minutes of the court to have testified at the trial had been fully or substantially set forth in the proposed bill. And compare the size of the record as so

amended with what it would have probably been if all the evidence had been brought up. Compare it, for example, with the record in the recently decided case of *Docia Nolan*, a common instance, in which one hundred and fifteen pages of the printed record are devoted to the cross-examination of a single witness,—a cross-examination full of repetitions, and which for every practical or useful purpose might have been so condensed as to cover five pages at the outside. And it is to be remembered that every unnecessary page allowed to go into a bill of exceptions costs the county a dollar for printing, for no purpose except to cumber the record and delay the hearing. It may be that this defendant was shown to be guilty, and that a reversal of the judgment on this appeal would have enabled him to escape deserved punishment, but an affirmance of the judgment in his case is dearly purchased at the cost of unsettling a rule of practice which experience has demonstrated to be as useful and convenient and economical as it is simple and definite.

Henshaw, J., and Lorigan, J., concurred in the dissenting opinion.

SUPPLEMENTAL OPINION.

(Filed October 20, 1904.)

ANGELLOTTI, J.—The dissenting opinion in this case having been prepared some time after the filing of the majority opinion, it would seem proper to notice briefly one or two suggestions made thereby. It may be freely admitted that it is most important, as regards the public, that in a matter of procedure a rule once established should be adhered to. It was attempted to be shown in the majority opinion that it has never been held that a presumption to the effect that a bill of exceptions contains all the evidence will obtain, where there is an affirmative showing on the face of the bill that it does *not* contain all the evidence or any statement of the substance thereof. The cases cited both in the majority and dissenting opinions were all cases where there was nothing upon the face of the bill to indicate that it was not a complete statement as to the effect of all the evidence given on the trial, and the presumption that it was a complete statement, therefore, existed. Whatever was said by the court in those cases was said with reference to the facts then

before the court. If, however, the bill itself affirmatively shows the fact to be that it does not contain a statement as to the effect of all the material evidence, there can be no reason why the appellate court should declare, in the face of the affirmative statement to the contrary, that it must be held that there was no other evidence. We can hardly believe that if the bill in this case had declared "there was other evidence given on the trial material to the issues involved" it would have been asserted by any one that a presumption to the contrary would still have obtained, and yet such bill in effect does so state.

Nor is there anything uncertain in the rule laid down in the majority opinion to the effect that it is essential to the existence of the presumption invoked that the bill should on its face fairly purport to state the evidence or its effect. What is meant by the expression "fairly purport to state the evidence or its effect" is amply illustrated by the record in the cases relied upon in the dissenting opinion. If there is apparent any attempt to state the effect of *the* evidence given on the trial,—that is, all the evidence,—it must be held that the bill fairly purports to state all the evidence, and the presumption will obtain; but where, by its terms, the bill is limited to the statement of only a portion of the material evidence, as here, where it simply states that "testimony given during the trial included the following," it cannot be said that the bill "fairly purports" to give all the evidence or its effect.

Nor can we see any force in the suggestion that the decision in this case will result in increasing the size of transcripts on appeal. Experience has demonstrated that some attorneys always insist upon unnecessarily long and elaborate bills of exception. This has been the fact at all times and whatever the rule of practice governing bills of exceptions. The record in the *Docia Nolan* case, referred to in the dissenting opinion, is but a sample of the record in many cases brought to this court while the rule contended for by the dissenting opinion must, if ever, have been in force, and what is said regarding that case shows that the supposed rule did not operate to prevent unwieldy records on appeal.

It has never been necessary and it will not be necessary under the decision in this case, for a defendant, desiring to

present the contention of insufficiency of the evidence, to state all the evidence word for word as it fell from the mouths of witnesses. As to those matters concerning which there is no dispute, the briefest statement as to the effect of the evidence will be, as is well shown by the dissenting opinion, all that is requisite; and as to the one or two matters concerning which the dispute exists, the statement should be sufficiently elaborate to show the facts. This has always been, and will continue to be, the rule. It is the duty of the judge settling the bill to strike therefrom all unnecessary matter, and to see that it is no more lengthy than the necessities of the case require, and we know of no other remedy in those cases where attorneys persist in proposing for insertion matters unnecessary to a determination of the questions desired to be presented on the appeal.

Shaw, J., McFarland, J., and Van Dyke, J., concurred in the supplementary opinion.

[S. F. No. 3776. In Bank.—October 5, 1904.]

In the Matter of the Estate of JOHN FAY, Deceased.
MARY J. SCOTT et al., Appellants, v. JOHN FAY et al., Respondents.

ESTATES OF DECEASED PERSONS—PROBATE OF HOLOGRAPHIC WILL—MISTAKE IN YEAR OF DATE.—A holographic will which is wholly in the handwriting of the deceased testator, and dated and signed by him, should be admitted to probate notwithstanding an evident mistake or error in the year of the date. If it becomes necessary, the true time at which such will was made may be inquired into; but a simple showing that the holographic will was made at a time different from that written therein will not invalidate it.

ID.—TIME FOR APPEAL FROM ORDER REFUSING PROBATE.—An appeal from an order refusing probate of the holographic will is properly taken within sixty days from the entry of the order. The section of the code in regard to the rendition of judgments does not apply.

ID.—AGGRIEVED PARTIES—BENEFICIARIES UNDER TRUST—VALIDITY—REVIEW UPON APPEAL.—The beneficiaries under a trust created by the holographic will are aggrieved parties, entitled to appeal from the order refusing probate thereof; and the validity of the trust clause as to the appellants will not be determined upon such appeal.

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing probate of a holographic will. J. V. Coffey, Judge.

The facts are stated in the opinion.

Louis S. Beedy, for Appellants.

Bart Burke, and Charles J. Pence, for Respondents.

COOPER, C.—This is an appeal from an order refusing to admit to probate an instrument purporting to be the holographic will of deceased.

The instrument was entirely in the handwriting of deceased, and bore date "May twenty-fifth, eighteen hundred and fifty-nine." It is not claimed that the deceased was not of sound mind, nor that the purported will was not his free act and deed. In the instrument the deceased made provision for his son Luke Fay, who was born in 1861; for his son John Fay, who was born about 1865; and for his daughter, Mary Montealegre, who was married to Carlos F. Montealegre in January, 1887, and died March 29, 1900. It is thus evident, from the testimony, that the instrument was not written in 1859, but at some time between the marriage of the daughter and her death. If we were to indulge in conjecture, we would say that the will was written May 25, 1889, the words "fifty-nine" being by mistake or carelessness inserted instead of the words "eighty-nine." There does not appear to be any explanation as to the discrepancy in the date which the instrument bears and the actual date or time when it was executed. No reason is suggested, and none suggests itself to us, as to any object the deceased could have in dating the instrument "eighteen hundred and fifty-nine." He had the right to make a holographic will, provided he complied with the statute in so doing. It is declared in the Civil Code (sec. 1277) that "a holographic will is one that is entirely written, dated, and signed by the hand of the testator himself." This is the same provision as in the Code Napoleon. The instrument in this case is a holographic will, unless we hold that the word "dated" in the above section means the actual and correct time when the instrument was written. The legislature has not used the words "truly dated" nor "correctly dated,"

but the word "dated," which must be construed according to the approved usage of the language (Civ. Code, sec. 13), and in its primary and general sense. (Code Civ. Proc., sec. 1861.) If we should hold that the word "dated" means the true and correct time when the will was written, then any difference shown between the date given in the instrument and the time when it was written would invalidate it. If, under such rule, a testator, in his right mind, by his own hand, should write his will and date it January 1, 1903, and it should be shown by oral evidence to have been written January 1, 1904, the will would be void; and yet we know by constant experience that business men many times during the first few days of the new year write the date of the old. And also many times we get the wrong impression as to the day of the month, and instead of the correct date write the date as of the day preceding, or even of the following day. The word "date" or "dated" is often used as referring to the date or time *written* in an instrument; thus it is provided in our code that any date may be inserted in a negotiable instrument, whether past, present, or future. (Civ. Code, sec. 3094.) The Century Dictionary defines the verb "date" "to mark with a date, as a letter or other writing." A will, other than a holographic will is not required to be dated, and as to all other wills, parol evidence is admissible to show the true date, even if contradictory of the written date. (Underhill on Wills, sec. 268.) A holographic will must be dated, for the reason that the legislature has said so, but we do not think it would be a sound rule to hold that any mistake or error in the date would invalidate the will. It will be presumed that the date given is the true date. We apprehend that cases will rarely occur in which this is not so. If it becomes necessary in any case upon a question as to the sanity of the testator, or probably other questions, the true time at which the will was made may be inquired into, but we hold that simply showing that a holographic will was made at a time different from that written therein will not invalidate it. The date is not the material thing, although made necessary by the statute. It is a means of identification, and aids in determining the authenticity of the will; but the main and essential thing is, that the will be wholly written and signed by the hand of the testator. The origin of holo-

graphic wills arose probably under the civil law where among unsolemn privileged wills was that of a father bestowing his property on his children, all in his own handwriting. (1 Brown on Civil and Admiralty Law, p. 290.) A holographic will may be proved in the same manner that other private writings are proved. (Code Civ. Proc., sec. 1309.) A private writing may be proved by evidence of the genuineness of the handwriting of the maker. (Code Civ. Proc., sec. 1940.) We do not mean to be understood as holding that a holographic will must not be dated, because that is made essential by the statute. Our attention has not been called to any case directly in point, nor have we been able to find any.

It is said in *Bement & Dougherty v. Trenton Locomotive etc. Co.*, 32 N. J. L. 515: "The primary signification of the word *date* is not time in the abstract, nor time taken absolutely, but, as its derivation plainly indicates, time *given* or *specified*, time in some way ascertained and fixed; this is the sense in which the word is commonly used. When we speak of the date of a deed, we do not mean the time when it was actually executed, but the time of its execution, as given or stated in the deed itself. The date of an item or of a charge in a book of account is not necessarily the time when the article charged was in fact furnished, but simply the time given or set down in the account in connection with such charge."

In Underhill on Wills (sec. 181) it is said: "Where the date is given it may be contradicted by parol, though until that is done it will be presumed, in a case of holograph, that the will was executed upon the date which is stated in it."

The language of the Civil Code of Louisiana is the same in meaning as the section of our code in regard to holographic wills. It was held by the United States circuit court in *Gaines v. Lizardi*, 3 Woods, 77, 9 Fed. Cas. 1042, that where the proof showed that a holographic will was written and signed by the testator, and bore date of some day in a designated month, but did not show of what particular day, that it was a sufficient compliance with the provisions of the code as to dating. The case involved the probate of a holographic will which had been lost or destroyed, but it illustrates the point in the case at bar. In case of a holographic will which has been lost or destroyed it might be impossible to prove the

day of the month, or even the month, in which it was executed, and yet the evidence might be clear and convincing that the will was entirely written, dated, and signed by the hand of the testator. Should the courts, in such cases, exclude the will from probate because the correct time at which it was written could not be proven? In *Estate of Skerrett*, 67 Cal. 587, the deceased in his lifetime signed a deed purporting to convey certain property to his sister. The record in the case shows that the deed was dated April 26, 1881, and acknowledged before a notary April 27, 1881. The deed was never delivered, and therefore could not take effect as a deed. It was not of a testamentary character, and could not be given effect by itself, as a holographic will. But a copy of the deed in the handwriting of deceased was found after his death in an envelope with a letter addressed to the sister. The letter was without date, but showed an intention clearly expressed in his handwriting that his sister should have the property. The time at which the copy of the deed was made by deceased did not appear, nor was there anything to indicate the time when the letter was written, except that it was some time after the acknowledgment of the deed. This court said: "Neither the copy of the deed nor the letter, taken by itself, constitutes a will; the one is not testamentary in its character, and the other has no date; but taking them together as the deceased left them, forming one document, it is complete. The first part furnishes the date, and the latter the testamentary character." Now, it appears evident, in the above-cited case, from the contents of the letter, that the copy of the deed and the letter must have been made after the date of acknowledgment. There was in fact nothing to show when the copy was made, but it contained a *date*, and with the letter the holographic will was held good. The case was followed and approved in *In re Soher*, 78 Cal. 478. In *Estate of Lake-meyer*, 135 Cal. 28,¹ a holographic will was headed: "New York, Nov. 22, '97," and it was held that the will was dated, the abbreviation "'97" meaning 1897. Therefore, it appears to be the rule of this court, as of all other courts, to construe wills as valid, in preference to holding them void.

It is provided in the Civil Code (sec. 1326) that of two modes of interpreting a will, that is to be preferred which

¹ 87 Am. St. Rep. 96.

will prevent a total intestacy. The supreme court of Louisiana adopted the above liberal rule in *Heirs of McMichael v. Bankston*, 24 La. Ann. 451, in which it was held that where two words in a holographic will were not in the handwriting of deceased, but did not change the meaning nor alter the dispositions made by the testator, the will would be upheld. When a man of sound mind and memory, by his own hand and signature, has plainly made a disposition of his property, the courts should carry out his intention if it can be done without violating the mandates of the law.

Respondent contends that his appeal was not taken within sixty days after "the rendition of the judgment," and hence the evidence cannot be considered on this appeal. The appeal was taken within sixty days after the entry of the order, and was within time. The section of the code in regard to rendition of judgments does not apply. (Code Civ. Proc., sec. 963, subd. 3; *In re Smith*, 98 Cal. 636; *Estate of Scott*, 124 Cal. 675.) The stipulation shows "that the testimony of the appellant John Fay and the testimony of Luke Fay, set forth in full in said transcript, was the only evidence adduced at the hearing of the petition for the probate of said will contained therein." Appellants are parties aggrieved and entitled to appeal. They are beneficiaries under a trust created by the will, and the court will not here determine the validity of the trust clause as to appellants. (Code Civ. Proc., sec. 1299; *Estate of Cobb*, 49 Cal. 599; *Estate of Murphy*, 104 Cal. 554; *Graham v. Birch*, 47 Minn. 171.¹)

It follows that the order should be reversed.

Gray, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is reversed.

Shaw, J., Angellotti, J., McFarland, J.,
Lorigan, J., Henshaw, J., Beatty, C. J.

¹ 28 Am. St. Rep. 339, and note.

[S. F. No. 2485. In Bank.—October 5, 1904.]

JAMES TAYLOR ROGERS, Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO et al., Respondents.

CERTIORARI—CONTEMPT PROCEEDINGS—FORMER JUDGMENT UPON HABEAS CORPUS.—Upon *certiorari* to review a judgment imposing a fine for contempt of the superior court in refusing to answer questions propounded to the petitioner by the grand jury, a former judgment of this court upon *habeas corpus* to review contempt proceedings for refusal to answer the same questions before the grand jury is not *res adjudicata* or a bar to the subsequent proceedings upon *certiorari*.

Id.—VOID ORDER—QUESTIONS BEFORE GRAND JURY—MATTER OF INDICTMENT—FRAUD—SELF-CRIMINATION.—An order of the superior court requiring the petitioner to answer certain questions before the grand jury in relation to a matter that had been disposed of by such grand jury and was no longer pending before that body, and the manifest object of which questions was merely to make the petitioner a witness against himself before the grand jury, to show that he had aided in the accomplishment of a felony, is void, and cannot form the basis of a subsequent order of court punishing the petitioner for contempt in disobeying its former order.

Id.—CONSTRUCTIVE CONTEMPT—SUFFICIENT AFFIDAVIT REQUIRED.—Where a contempt is committed outside the presence of the court an affidavit of the facts forming the basis of judicial action must show on its face a case of contempt, and if it does not the court has no jurisdiction, and the order of contempt is void.

CERTIORARI to review a judgment of the Superior Court of the City and County of San Francisco in contempt proceedings. Frank H. Dunne, Judge.

The facts are stated in the opinion of the court.

J. T. Houx, Houx & Barrett, and James Taylor Rogers, for Petitioner.

I. Harris, for Respondents.

ANGELLOTTI, J.—*Certiorari* to review a judgment of the superior court of the city and county of San Francisco imposing upon plaintiff a fine of five hundred dollars for contempt of court.

The judgment in the contempt proceedings against plaintiff declared him guilty of contempt for his refusal to answer any of eleven questions propounded to him by the grand jury of the city and county of San Francisco, after having been directed by the superior court to answer the same, and adjudged that for said contempt he pay a fine of five hundred dollars, and, further, that he be imprisoned in the county jail of said city and county for five days. Having been imprisoned under said judgment, he sought his discharge by *habeas corpus*, but was by this court remanded upon the ground that so far as the record then before the court showed, at least one of the questions propounded was relevant and pertinent to the matter under investigation by the grand jury, and it had not been made to appear that his answer to the question would either have a tendency to incriminate him or degrade his character, and that therefore his refusal to answer this question was not justified in law, and he had properly been adjudged to be in contempt. (*In re Rogers*, 129 Cal. 468.)

The defendant pleads the judgment of this court in the *habeas corpus* matter in bar of this proceeding, but we are satisfied that it can have no such effect. It is well settled that the doctrine of *res adjudicata* is not, in the absence of statutory provision, applicable to the decision of a court or judge remanding a person in *habeas corpus* proceedings. (Church on Habeas Corpus, sec. 386; *In re Ring*, 28 Cal. 247-251; *Bradley v. Beetle*, 153 Mass. 154; *People v. Brady*, 56 N. Y. 182.) Under our statute, a judgment on *habeas corpus* remanding a petitioner is not, as a matter of law, a bar to a subsequent application of the same kind to the same or another court (*In re Ring*, 28 Cal. 247), and it certainly can have no such effect in this proceeding. This is true, whether all of the material facts were presented at the first hearing or not. (*Bradley v. Beetle*, 153 Mass. 154.)

The transcript of the record certified to this court shows that the plaintiff, in response to the first order to show why he should not be punished for contempt for failing to answer the questions propounded by the grand jury, presented a verified answer, and a copy of this is contained in such transcript. The affidavit of the foreman of the grand jury upon which the order was based was presented and filed July 24,

1900, and stated that the questions were asked plaintiff in the investigation by the grand jury of a charge of forgery against one Chretien, and that the questions were pertinent and material in such investigation.

In his answer, plaintiff sought to make it appear that he was justified in refusing to answer any of the questions by section 2065 of the Code of Civil Procedure, which provides that a witness need not give an answer which will have a tendency to subject him to punishment for a felony, or which will have a direct tendency to degrade his character, unless it be the very fact in issue, and by section 13 of article I of the state constitution, which provides that no person shall be compelled in any criminal case to be a witness against himself. He also alleged certain facts tending to show that the investigation against Chretien had been concluded, and that an indictment had been found and presented.

No showing as to the facts was made in reply to the verified statement of plaintiff, and the court did not find that such statement was in any respect untrue, but simply found "that the matters and things set up in said answer do not constitute just and legal cause why the said questions should not be answered by said Rogers," and ordered and adjudged "that the said questions propounded to said . . . Rogers were legal and proper, and that it was the duty of said Rogers to answer the same," and further ordered that he answer each and all of said questions "whenever thereto subpoenaed and requested and when next appearing before said grand jury." The second affidavit of the foreman of the grand jury, presented August 3, 1900, simply alleged that when the witness appeared on that day in response to another subpoena issued, the same questions were again put to him, and he again refused to answer, notwithstanding the previous order of the court requiring him to do so. This affidavit is entirely silent upon the question as to whether any investigation was then being made by the grand jury as to the charge against Chretien mentioned in the first affidavit, or as to any charge against Chretien. The second order to show cause was thereupon made, and upon the hearing the court refused to allow the plaintiff to file his affidavit in reply to the order, doubtless upon the theory that the questions thereby presented had been disposed of on the previous hearing.

Thereupon the court found that the refusal of the plaintiff to answer the questions was a "direct disobedience of the order of the superior court made . . . July 25, 1900," and that he was therefore guilty of contempt, and pronounced the judgment in question. It is apparent that if the order of July 25, 1900, was invalid, the judgment subsequently pronounced is void. For it is entirely based upon the previous order, and the punishment was imposed solely for the disobedience of said order. The second affidavit of the foreman of the grand jury is manifestly insufficient as the basis of a proceeding for contempt on account of the refusal of a witness to answer questions, for it entirely fails to show that the charge against Chretien was under investigation by the grand jury at the time plaintiff was again called before that body to testify as a witness, and there is no mention in either affidavit of said foreman of any other charge to which the question might have been material or pertinent. A witness can be compelled to answer only such questions as are legal and pertinent to a matter in issue before a tribunal, and for a refusal to answer questions that are not pertinent to the issue being tried, he cannot be adjudged guilty of contempt. (Code Civ. Proc., sec. 2066; *Ex parte Leehandelaar*, 71 Cal. 238; *Overend v. Superior Court*, 131 Cal. 280, 286; *In re Rogers*, 129 Cal. 468.) A grand jury, like a court, may ask only such questions as are pertinent to a matter then under investigation, and if there be no matter under investigation, a refusal to answer questions cannot be made to constitute a contempt. "When the contempt is a constructive contempt, namely, committed without the presence of the court, the affidavit of facts forming the basis of judicial action must show upon its face a case of contempt; and, if it does not, then the court is wanting in jurisdiction, and the order of contempt is void." (*Overend v. Superior Court*, 131 Cal. 280.)

It is therefore only by reading the second affidavit of the foreman of the grand jury in connection with the prior affidavit and proceedings, and upon the theory that a disobedience of the order of the court requiring the witness to answer the questions or any of them, would of itself, without regard to the conditions existing at the time the witness again appeared before the grand jury, constitute a contempt, that the judgment of contempt can possibly be justified.

This is apparently the theory upon which the superior court proceeded, and unless such order was a valid and enforceable order, the judgment of contempt was, as already said, unauthorized.

The order in question admitted the truth of the matters and things set up in plaintiff's answer, finding simply that such matters and things did not constitute just and legal cause why the said questions should not be answered. There is thus presented only a question of law,—viz., the question as to whether the allegations of the answer, taken as true, established a case in which the witness was justified in refusing to answer upon the ground either that the answers would have a tendency to incriminate him or degrade his character, or that they were not material and pertinent to any matter then in issue. The decision of the court adjudicating one guilty of contempt is upon both these questions reviewable either on *habeas corpus* (*Ex parte Zeelandelaar*, 71 Cal. 238; *In re Rogers*, 129 Cal. 468), or upon *certiorari* (*Overend v. Superior Court*, 131 Cal. 280. See, also, *Schwarz v. Superior Court*, 111 Cal. 106, 112.) If such a case is shown, the superior court was without power to adjudge plaintiff guilty of contempt.

We have carefully examined the allegations of the answer in connection with the questions propounded to the plaintiff, and are satisfied that he was justified upon both grounds in refusing to answer each and all of the questions.

It appears from the answer presented in the contempt proceedings that distribution of the residue of the estate of one Joseph Sullivan, deceased, including several thousands of dollars in money, had been made by the superior court of the city and county of San Francisco to an alleged heir, "John Sullivan," under such circumstances as to give rise to the suspicion that the property of the estate had, through fraud on the part of parties and attorneys appearing in the matter, been distributed to a spurious heir, and divided among those participating in the fraud. Chretien appeared as the attorney for "John Sullivan." The plaintiff, who had appeared for certain persons alleged to be heirs, and filed a petition for distribution of the residue to them, claiming that he had become satisfied that his clients were not entitled to share in the estate, had abandoned his claim, and had thus allowed

the distribution to be made to "John Sullivan." Chretien, plaintiff, and others were charged by a statement published in the San Francisco Call, a daily newspaper, with serious criminal misconduct in relation to the distribution of the estate, and an investigation was had by the superior court having jurisdiction of the estate, resulting in an order purporting to vacate the decree of distribution. In that investigation, Chretien himself testified that he had been guilty of various crimes relative to said estate, including that of forgery of various receipts purporting to have been given by "John Sullivan" for moneys received therein. Within a few days thereafter there were published in the San Francisco Examiner, a daily newspaper, two statements purporting to have been severally made by Chretien and another, accusing plaintiff, in effect, of having received six hundred dollars for the abandonment of the claim of his clients, and charging that the estate had been robbed through the instrumentality of spurious heirs, and accusing plaintiff of consciously aiding therein.

It was under these circumstances that the grand jury commenced the investigation, and, upon the theory that the same were pertinent and material in the investigation of the charge of forgery against Chretien, the eleven questions were asked of plaintiff. These questions related entirely to his, the plaintiff's, conduct and acts in the matter of said estate of Joseph Sullivan, the allegations contained in the papers filed by him therein, his knowledge and information as to whether or not "John Sullivan" was in fact the true heir of deceased, his reasons for the abandonment of the cause of his clients, and as to whether he had received any money therefor. Considered in connection with the admitted facts, the questions asked were all material and pertinent upon the question as to whether the plaintiff had himself been guilty of criminal misconduct, and with the exception of one or two were material only upon that question. The one or two questions that might possibly be considered pertinent to the investigation of the charges against Chretien went to the question of the information of plaintiff as to the falsity of the claim made by Chretien on behalf of the alleged heir, "John Sullivan," at the time that he, plaintiff, withdrew his opposition to distribution to said "John Sullivan," and thus aided in the

accomplishment of a crime. It was charged, in effect, that he had willfully aided and abetted in the commission of a felony, the obtaining of the property of this estate, amounting to several thousands of dollars, by fraud and false representations.

It requires only a reading of the questions asked to demonstrate that they were asked for the purpose of obtaining evidence upon which to proceed against the plaintiff himself, rather than Chretien, for a felony. That the answers to such questions would, if the charges made were well founded and the witness answered truly, serve such purpose, is too clear for question.

However commendable may be a desire to ascertain the truth and to punish offenders against the law, so long as we adhere to the settled policy of this country and of England, that no person shall be compelled to be a witness against himself in a criminal proceeding, so long must a witness be protected in his refusal to answer questions the answers to which will serve to show that he has been guilty of a felony, for which he may be prosecuted. Where it is made to appear that such is the nature of a question asked, a court is without power to compel an answer, and its adjudication of contempt is a nullity.

The answer in the contempt proceedings, presented in response to the first order to show cause, further, in effect, alleged that the grand jury had already, upon the testimony adduced before it, and without the evidence of plaintiff, found and presented to the superior court an indictment against Chretien, upon the charge stated in the affidavit of the foreman of the grand jury, which was one of forgery of the indorsement of a certain check, and that such indictment was pending in said court. The truth of these allegations being conceded, it is apparent that the investigation of the charge mentioned in such affidavit had been concluded, and that said charge was no longer pending before the grand jury. Under these circumstances, the questions were no longer material or pertinent to any issue before the grand jury, so far as the record shows, save and except the single question as to the guilt or innocence of the plaintiff himself.

Whatever may have been the situation when the questions were first asked, the superior court had no power to compel

the plaintiff to answer them after the issue to which they were material had been determined and the investigation thereof by the grand jury finally concluded.

For the two reasons stated, the judgment of the superior court must be held to have been beyond its jurisdiction. It is unnecessary to notice other points made by the plaintiff. It may be contended that the conclusion here reached is at variance with the conclusion in the *habeas corpus* proceeding (*In re Rogers*, 129 Cal. 468), wherein this court remanded the plaintiff to suffer the imprisonment imposed by the judgment. We have already shown that such disposition of the *habeas corpus* matter is no bar to this proceeding. It was said in the opinion filed therein that it was not made to appear that "his answer to the question would either have a tendency to incriminate him or degrade his character." Such may have been the condition of affairs in that proceeding. The opinion does not show and the record of the proceeding does not disclose, what was made to appear therein. Nor was anything said in the opinion as to the effect of a showing that the investigation of the charge against Chretien had been finally concluded prior to the making of the order requiring plaintiff to answer the questions.

Regardless, however, of the question as to whether the *habeas corpus* matter was, upon the record then before the court, correctly decided, it is clear to us that, upon the record now before the court, the plaintiff is entitled to the relief sought.

The judgment of the superior court imposing a fine of five hundred dollars upon the plaintiff is annulled.

Shaw, J., McFarland, J., Van Dyke, J., Lorigan, J., and Beatty, C. J., concurred.

Henshaw, J., concurred upon the ground last stated.

[S. F. No. 3035. Department One.—October 7, 1904.]

MARIAN G. GREEN, Respondent, v. A. C. SOULE, Appellant.

NEGLECT OF INDEPENDENT CONTRACTOR AND SUBCONTRACTOR—BUILDING CONTRACTOR NOT LIABLE.—A building contractor is not liable for the negligence of another independent contractor employed by the owner to do the plumbing and sewer work; nor is he liable for the negligence of an independent subcontractor employed by himself to do the plastering for the building for a specified sum, who agreed to furnish all the materials and labor required to complete the subcontract, and who had the entire charge of that part of the work and sole control of the workmen engaged therein.

ID.—QUESTION OF LAW—IMPROPER REFUSAL OF INSTRUCTIONS.—Where the undisputed evidence showed that the plasterer was an independent contractor as to the building contractor defendant, and the subcontract did not require him to place his materials in any dangerous position, the meaning and effect of the contract and the relations of the parties to it were a question of law for the court; and it is error to refuse requested instructions that the subcontractor was an independent contractor as to the defendant, and that if the jury believed the injury complained of was the result of negligence on the part of the subcontractor, they must find for the defendant.

ID.—SUPERVISION OF ARCHITECT—RIGHT OF EMPLOYER TO MAKE ALTERATIONS.—The fact that the work was to be done under the supervision of an architect, and that the employer had the right to make alterations, deviations, and omissions from the contract, does not change the relation of an independent contractor or subcontractor to that of a mere servant.

ID.—SUPPORT OF VERDICT—CONFLICTING EVIDENCE—DUTY OF TRIAL COURT.—Where the evidence in support of the verdict, though not very satisfactory, is sufficient to raise a conflict, its sufficiency to support the verdict cannot be decided by this court; but it is the duty of the judge of the trial court to grant a new trial where the verdict is against the weight of the evidence, according to his independent judgment, notwithstanding a conflict therein.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

Robert Ash, for Appellant.

E. A. Bridgford, John Ralph Wilson, and Burrell G. White, for Respondent.

SHAW, J.—The action is to recover damages for personal injuries arising from the negligence of the defendant. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The complaint alleges that one Charles Gebhardt made a contract in writing with the defendant for the erection of certain buildings at the corner of Eddy and Franklin streets in San Francisco; that there was an ordinance of the city and county of San Francisco providing that any person by whom, or under whose immediate authority as principal contractor or employer, any portion of a public street should be made dangerous should while the danger continued maintain a good and substantial barrier around the dangerous portion of the street, and cause to be maintained during every night from sunset to daylight a lighted lantern at the ends of the dangerous portion of the street; that the defendant in the erection of said building caused to be placed on the southerly line of Eddy Street, in front of the building, a mortar-bed, boxes, barriers, and other building materials extending from the sidewalk to within four feet of the car-track in the center of the street, the said obstructions being from two to three feet in height and rendering the street dangerous to travelers; that on the night of December 7, 1900, the defendant having failed to erect any barrier or place any lights at said obstructions, the plaintiff, passing along the street in a buggy, ran over the obstructions and was thereby thrown out of her vehicle and injured. The evidence showed without conflict that Gebhardt, the owner of the premises, made two separate contracts for the erection of different parts of the building, one with the defendant, and the other with one C. G. Stuhr. By the contract with the defendant it was agreed that the defendant should furnish the necessary labor and materials, and perform all the excavations, concrete, brickwork, marble steps, carpenter-work, glass, bell, and electric work, vestibule tiling, plastering, tinning, and ironwork, and "other works shown and described in and by, and in conformity with the plans, drawings, and specifications for the same . . . hereto annexed." The plans and specifications were not introduced

in evidence. It will be observed, however, that the above enumeration does not expressly include the plumbing or sewer-work connected with the building. By the contract with Stuhr it was agreed that Stuhr should furnish the necessary labor and materials and perform and complete all the gasfitting, sewerage, plumbing, and other work described in and by, and in conformity with, the plans, drawings, and specifications annexed to the said contract. These plans and specifications were not introduced in evidence. The testimony shows, however, without contradiction that the defendant had nothing whatever to do with the placing of the sewers in the building or with making the excavations necessary for that purpose, and that that part of the work was done under the contract with Stuhr, and not under that made by the defendant.

The evidence shows further that the defendant made a subcontract with D. Leahy, whereby, for a specified sum, Leahy agreed to furnish all the necessary materials and perform all the labor required in the plastering of the building in accordance with the plans and specifications, and that in pursuance of this contract Leahy did the plastering and had the entire charge of that part of the work and sole control of the workmen engaged therein. A number of witnesses for the plaintiff testified that immediately after the accident to the plaintiff they examined the street in front of the building and found obstructions in the street from two to three feet high, extending from the sidewalk to within two or three feet of the street-car track in the center of the street, consisting of lumber, barrels, boxes, mortar-beds, and other building materials. None of them gave any statement concerning the relative location of the different materials mentioned, nor did they expressly state that they were all mixed together in the pile, and on these points, so far as the plaintiff's testimony was concerned, the jury were left to conjecture. For the defendant several witnesses testified positively that they examined the premises the following morning; that there was a pile of broken concrete and pieces of asphaltum, taken from the street pavement in digging the trench for the sewer connection, extending along the east side of the trench from the sidewalk to within two or three feet of the car-track, and from two to three feet high, and that there were no other materials

or obstructions in the street except the mortar-box used by the plastering contractor, Leahy, and this box did not extend into the street to exceed five feet from the sidewalk. The sewer-trench had been filled in to the level of the street the day before the accident, but according to the testimony of these witnesses the concrete and asphaltum had been left in the pile alongside the trench. The distance between the curb and the nearest rail of the car-track was shown to be about seventeen feet. It was also shown without conflict that the defendant had nothing to do with the employment of the men engaged under Leahy, the subcontractor for the plastering, nor any control of them while engaged in the work.

The court instructed the jury that "An independent contractor is a person who is employed in the exercise of an independent and distinct employment, and not under the immediate control or supervision of the employer," and that if they should find that the injury complained of was caused by an obstruction erected by Leahy in carrying out a contract between himself and the defendant, and should also find that Leahy was an independent contractor, then they should render a verdict for the defendant. Instructions numbered seven and eight asked by the defendant and refused by the court were as follows: "7. A subcontractor under an original contractor may be an independent contractor as to such original contractor, and I instruct you that D. Leahy, the contractor for plastering the building, was an independent contractor as to the defendant, A. C. Soule, when he became the contractor for the work of plastering the house. 8. If you believe from the evidence that the injury complained of was the result of negligence on the part of the subcontractor, D. Leahy, then you must find for the defendant."

We think the refusal of these instructions was error. "An independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished. . . . The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for." (16 Am. & Eng. Ency. of Law, 2d ed., p. 187.) The fact that the work is to be done under the supervision of an architect,

or that the employer has the right to make alterations, deviations, additions, and omissions from the contract, does not change the relation from that of an independent contractor to that of a mere servant. (16 Am. & Eng. Ency. of Law, 2d ed., p. 187; *Frassi v. McDonald*, 122 Cal. 402.) These principles apply "likewise in favor of the principal contractor as against any liability on his part for the acts of a subcontractor, or of a subcontractor's servants." (16 Am. & Eng. Ency. of Law, 2d ed., p. 194, and cases cited.) There was nothing in the contract for the plastering which contemplated or required that the person doing the plastering should place his materials on the street or sidewalk, and therefore it could not be contended that the contract itself was for the creation of an obstruction in the street which would constitute a nuisance. There was no conflict in the evidence with respect to the terms of the contract between the defendant, as the principal contractor, and Leahy, as subcontractor for the plastering, nor were its terms in any respect ambiguous or uncertain so as to require any fact to be established in order to determine its effect. The meaning and effect of the contract, and the relation of the parties to it thereby created, consequently became a question of law to be decided by the court. (11 Am. & Eng. Ency. of Plead. & Prac., pp. 78, 79, 80, 88, 89.) Under the evidence there can be no question but that Leahy occupied the relation of independent contractor to the defendant. He exercised an independent occupation; his contract required him to bring about the result of plastering the house, and he was left entirely free to select for himself the means and mode of doing the work and the persons to be immediately employed therein, without any control, or right of control, in the defendant. It was therefore the duty of the court, on request, to instruct the jury that Leahy was an independent contractor, and not leave it to the jury to determine according to their own notions the effect of the contract in that respect. (11 Am. & Eng. Ency. of Plead. & Prac., pp. 80, 89.)

The instruction was important because of the vague and unsatisfactory state of the evidence in regard to the character of the obstructions which caused the injury. There was a conflict as to whether or not there were any boxes, barrels, and lumber in the street at the point where the buggy upset, and it was uncertain whether, if in fact there were any such mate-

rial there which caused the injury, such material was a part of that in use by the defendant or a part of that in use by Leahy, the plasterer. There was some evidence that the persons who made the excavation for the sewer connection used lumber belonging to Leahy for the purpose of holding up the sides of the trench while they were digging it, and that the trench was filled in again the day before the accident. The lumber would then be no longer necessary for use in the sewer-work, and it may be that this was the lumber observed by the witnesses for the plaintiff who testified that the obstructions consisted in part of lumber, and that it was carelessly left in the street by Leahy after it was returned to him. The boxes and barrels testified to may also have been those left there by Leahy, and not by the defendant. All these things were questions to be determined by the jury and the instructions requested by the defendant should have been given for their guidance in considering their verdict. For this error the order denying a new trial must be reversed.

It is earnestly contended by the appellant that the evidence was insufficient to justify the verdict. The principal claim as to this point is, that it was proven without conflict that there was at the time of the injury an obstruction made by the sewer contractor, consisting of a pile composed of sand, broken concrete, and pieces of asphalt pavement, extending from the sidewalk to within two or three feet of the car-track, and some two or three feet high alongside of and directly east of the sewer-trench; that the trench itself had been filled up the day before; that all the other obstructions were situated along the street farther to the east; that the plaintiff was driving along the street from west to east, and consequently must have been first struck and upset by the pile of asphaltum and concrete, for which the defendant was in no wise responsible. Some five witnesses for the defendant testified directly that there was such a pile of paving material at that time and place, and that there were no other materials on the street at the point where plaintiff said her buggy was upset. The defendant also testified that there were marks on this pile of material the next morning, showing where the wheel of some vehicle had run upon and over it. The only contradiction of the fact of the existence of this obstruction in the street was the testimony of Cleary, a witness for the

plaintiff, who testified that he was the sewer workman who excavated and filled the sewer-trench; that practically all the sand and concrete taken from the trench were replaced therein, and that the asphaltum was first taken off the top of the trench and was then piled on the sidewalk.

This evidence, though not very satisfactory, is sufficient to raise a conflict which cannot be decided by this court. If the court below was satisfied that the witnesses for defendant were entitled to equal credit with Cleary, it might well have ordered a new trial. But this court cannot pass upon the credibility of witnesses, and hence cannot interfere upon this ground. We frequently have cause to believe that the judges of the superior court are too reluctant to exercise their power of granting a new trial for insufficiency of the evidence, and too much inclined to acquiesce in a verdict of the jury which does not meet with their own approval. There is a clear and obvious distinction between the duty of a trial court and the duty of an appellate court with respect to the decision of such questions, and it is well established by the decisions of this court. The trial court cannot rest upon a conflict in the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it. "Where the decision is against the weight of the evidence it is the duty of that court to grant a new trial." (*Irving v. Cunningham*, 58 Cal. 309; *Mason v. Austin*, 46 Cal. 387; *Hawkins v. Abbott*, 40 Cal. 639; *Bjorman v. Fort Bragg Co.*, 92 Cal. 500.) "If the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony. He has had the same opportunity as the jury to observe the manner of the witnesses, and to decide upon their credibility, and it is his duty to see that the verdict is not clearly against the weight of the evidence. He must exercise a wholesome and discreet supervision over the jury in this respect." (*Dickey v. Davis*, 39 Cal. 569.) "There, although there may be what to us, judging from the cold record, seems a substantial conflict in the evidence, the court having heard the evidence, and having had ample opportunity to judge as to the demeanor, manner, and credibility of the witnesses, may, if he is dissatisfied with the verdict, and is of the opinion that

it is clearly against the weight of the evidence, set it aside and grant a new trial. The judge of the superior court is in a position to determine between the apparent and the real, to detect the fallacy of specious testimony which may have misled the jury, but which his wider experience enables him to readily comprehend." (*Bates v. Howard*, 105 Cal. 178.) Of course, the judge should give due respect to the verdict of the jury, and may sometimes properly deny a new trial in cases where if submitted to him without a jury he might upon the evidence have made a different decision. He must be clearly satisfied that the verdict is wrong; otherwise, he should let it stand. But in considering the question upon the motion he must act upon his own judgment as to the effect of the evidence. The parties are entitled to the judgment of the jury in rendering a verdict, in the first instance; but upon a motion for a new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence.

We have considered the case upon the theory that the answer sufficiently denies the allegation that the defendant placed in the street the mortar-beds, boxes, and barrels extending from the sidewalk to within four feet of the car-track. We have done so because the plaintiff does not raise the question and the case appears to have been tried upon the theory that the denial is sufficient. As the question may be raised upon another trial, the attention of counsel is directed to the form of the denial, so that if objection is then made, the defendant may amend as he may be advised.

The order denying the new trial is reversed, the judgment vacated, and the cause remanded for further proceedings.

Angellotti, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[Crim. No. 1164. Department One.—October 7, 1904.]

THE PEOPLE, Appellant, v. ALBERT B. MAHONY, Respondent.

CRIMINAL LAW—FRAUDULENT CLAIM AGAINST COUNTY—INSUFFICIENT INDICTMENT.—An indictment for the presentation of a false and fraudulent claim against the county, under section 72 of the Penal Code, which does not set forth the particular acts and facts which make the claim fraudulent, and does not allege wherein it is false, is insufficient, in not conforming substantially to the requirements of sections 950, 951, and 952 of the Penal Code. The allegation that the claim is fraudulent is a mere conclusion of law, and presents no issuable fact.

Id.—CASE OVERRULED.—The case of *People v. Carolan*, 71 Cal. 195, overruled as to the sufficiency of an indictment under section 72 of the Penal Code, which merely follows the language of that section.

APPEAL from an order of the Superior Court of the City and County of San Francisco sustaining a demurrer to an indictment. Carroll Cook, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, E. B. Power, Deputy Attorney-General, and Lewis F. Byington, District Attorney, for Appellant.

George D. Collins, *Amicus Curiae*, for Respondent.

ANGELLOTTI, J.—This is an appeal by the people from a judgment in favor of defendant, sustaining and allowing his demurrer to an indictment found and presented against him by the grand jury of the city and county of San Francisco, the grounds of demurrer specified, in addition to want of facts to constitute a public offense, being that the indictment did not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code.

The superior court, apparently being of the opinion that the objection on which the demurrer was allowed might be avoided in a new indictment, directed that the case be submitted again "to the grand jury now in session," but the attorney

for the people preferred to stand upon the indictment already presented, and took this appeal.

The indictment was based upon the provisions of section 72 of the Penal Code, and alleged that the defendant did, "with intent to defraud the city and county of San Francisco," present for allowance to the auditor of said city and county "a certain false and fraudulent claim, bill, account, and writing, in the words and figures following, to wit:—

"Co. Clerk F. No. 170.

"Legal Department. County Clerk's Assistants.

"Auditor's No. Treasurer's No. \$100.00

"SAN FRANCISCO, Oct. 31, 1903.

"A. Davidson presents this demand on the treasury for the sum of one hundred dollars, being for his salary as copyist for the month of Oct., 1903.

"As authorized by article III, chapter IV, article V, chapter V, section 2, of the charter of the city and county of San Francisco, approved January 19, 1899, in relation to certain deputies, assistants and copyists of county clerk.

"A. DAVIDSON, Signature.

"Allowed, payable out of the general fund.

".....190...

".....

"Auditor City and County.

"By

"Deputy.

"Correct

ALBERT B. MAHONY,

"County Clerk.

"By.....

"Deputy.

"Received Payment,.....

"Auditor's receipt No.....

"Legal Department County Clerk's Assistants. General Fund.

"When paid,

Delivery stamp.

"This demand can only be paid out of the income and revenue provided, collected, and paid into the general fund of the treasury for the fiscal year 190....

"Registry stamp."

It is further alleged "that said Albert B. Mahony then and there well knew that said false and fraudulent claim . . . was then and there false and fraudulent."

There was no allegation of any fact tending to show wherein the claim set forth was in any way "false" or "fraudulent," the allegations in this respect, in addition to setting forth a copy of a claim in favor of one Davidson, which was valid upon its face and certified as correct by the defendant as county clerk, being in the general language of the statute describing the offense. The falsity or fraudulent character of this claim, if it was in fact false or fraudulent, arose from some fact or facts not alleged, and concerning which the indictment furnished absolutely no information. An examination of the copy of the claim set forth shows that this apparently valid claim may have been "false" in any one of many ways, and "fraudulent" for any one of a great variety of reasons. Nothing, however, but the conclusion that it was both false and fraudulent is alleged, and the defendant, who must be presumed to be innocent of any crime, was left entirely in the dark as to any facts upon which the allegations of falsity and fraud were based.

It is urged in support of the indictment that it is generally sufficient to describe the offense substantially in the language of the statute. This is undoubtedly the general rule, but, as has been said, such rule simply means "that when the statute defines or describes the *acts* which shall constitute a particular offense, it is sufficient in an indictment to describe those acts in the language employed in the statute, applying them, of course, concretely to the person charged." (*People v. Ward*, 110 Cal. 369, 372.) In such cases, the statutory description gives to the accused sufficient notice of the charge against him. In the vast majority of cases the statute declaring the public offense does so define or describe the acts constituting it, but in many cases it does not, and to these cases is applicable the qualification to the general rule described by Mr. Justice Harlan in *United States v. Simmons*, 96 U. S. 360, as a qualification "fundamental in the law of criminal procedure, that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent

prosecution for the same offense." Our Penal Code provides that the indictment or information must contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended" (sec. 950, subd. 2); that it must be direct and certain as regards "the particular circumstances of the offense charged, when they are necessary to constitute a complete offense" (sec. 952, subd. 3); and that it is sufficient if, among other things, the act charged as the offense is set forth "in such a manner as to enable a person of common understanding to know what is intended." These provisions but recognize the principle universally recognized in civilized countries, that one accused of crime shall be allowed to know the charge against him, so that he may have an opportunity to present his defense there-to, if any he has. (See *People v. Palmer*, 53 Cal. 615; *People v. Ward*, 110 Cal. 369.)

The qualification to the general rule is peculiarly applicable in cases where fraud is an element of the offense, and the statutory definition of the crime simply includes the general term "fraud" or "fraudulently," without any description of the acts which shall constitute the fraud. This is necessarily so, in view of the fact that fraud is but an inference of law from certain facts. This was clearly set forth by this court in Bank in the case of *People v. McKenna*, 81 Cal. 158, where the defendant was charged in the language of the statute defining the offense with having defrauded one of personal property "by false and fraudulent representations and pretenses." After stating that fraud is merely an inference of law from certain facts, that the question as to whether a thing was done fraudulently is a matter of law, and that an allegation of fraud in general terms presents no issuable fact, the court said: "It is a sound principle that an indictment charging fraud of any kind should aver with particularity the *facts* relied upon to show fraud. Many of the niceties and technicalities which existed under former methods of pleading are not allowed to prevail under the provisions of our code, but the rule still exists that an indictment must be certain and clear as to the particular circumstances of the offense charged when they are necessary to constitute a complete offense. (Pen. Code, sec. 952, subd. 3.)"

In *People v. Neil*, 91 Cal. 465, it was held by this court in Bank, following *People v. McKenna*, 81 Cal. 158, that an information charging one, in the language of section 45 of the Penal Code, with fraudulently voting when not entitled to vote, was insufficient as against demurrer. In the opinion in that case *Hirschfield's Case*, 13 Blatchf. 331, was approvingly cited, wherein it was held that a charge that one had fraudulently registered, although in the words of the statute, was insufficient, and it was said that something more must be stated in order to give the accused any proper notice of the charge which he was to meet, it being impossible for him to determine from the charge what he would be required to show in his defense.

These decisions of this court are in line with the decisions generally on the question of the necessity of alleging the facts upon which a charge of fraud is based, and are apparently conceded by learned counsel for the people to be correct. It is sought, however, to distinguish them from the case at bar, but we can see no distinction material to the question under discussion. It was essential to the commission of the offense sought to be charged by the indictment before us that the claim presented by defendant for allowance was in fact false or fraudulent. It was alleged that it was both false and fraudulent. The allegation that it was fraudulent was the allegation of a mere conclusion of law, assumedly based upon certain facts not disclosed by the indictment. What the extraneous facts, claimed by the district attorney to render it fraudulent, and alleged by the indictment to have been known to defendant, were, the indictment fails to show, and the defendant was left in absolute ignorance as to the particular charge he would be compelled to meet in this connection. It may be that the claim itself is set forth with sufficient certainty to enable the defendant to plead a judgment on the merits in bar of any subsequent prosecution, but this is only one object of the rule requiring the acts claimed to constitute the offense to be sufficiently set forth, the other equally important object being to apprise the accused with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense. The rule stated by Mr. Justice Temple in *Capuro v. Builders' Ins. Co.*, 39 Cal. 125, as applicable to civil cases,—viz., that while the party alleging

fraud is not required to allege with minuteness all the particulars and circumstances which constitute the evidence of the alleged fraud, he must make the charge with sufficient distinctness to enable his adversary to come prepared with his evidence upon the general questions of fraud which will be raised,—is applicable as well to criminal cases. No other rule would be consonant with a due regard for the liberty of the individual and the protection of property.

We are satisfied that where it is sought to charge one with the presentation of a fraudulent claim under section 72 of the Penal Code the particular acts which make the claim fraudulent should be so alleged as to make the fraud appear upon the face of the indictment. (See in this connection *United States v. Googin*, 1 Fed. 49.)

It is unnecessary to determine whether the allegation that the claim was "false" as well as fraudulent adds anything to the indictment. The particular objection that we are considering is not that the indictment does not state facts constituting a public offense, but that it does not conform to the requirements of sections 950, 951, and 952 of the Penal Code, in that it does not sufficiently set forth "the acts constituting the offense," and "the particular circumstances of the offense charged," so as to enable the defendant to know what was the precise charge against him and to prepare his defense thereto.

Being advised by the indictment that the people charge that the claim was fraudulent as well as false, even if there be any distinction between these terms as used in connection with a claim such as is set forth in such indictment, he is certainly entitled upon objection made by demurrer to know with reasonable certainty the facts relied upon by the people as constituting the alleged fraud.

We do not wish to be understood as holding that it would be sufficient in alleging an offense under section 72 of the Penal Code to allege simply that a claim was "false," without alleging wherein it was false. It is very easy for the pleader to set forth specifically wherein a claim presented for allowance is claimed to be erroneous, and it certainly would be more in accord with the rule that we have discussed as applicable to this case that this should be done.

The attorney-general, in support of this indictment, relies

almost entirely upon the decision of this court in Department, in *People v. Carolan*, 71 Cal. 195. The question here involved received little consideration in the opinion in that case, being disposed of by the simple statement that the indictment was sufficient, charging the offense, as it did, in the language of section 72 of the Penal Code. No authority was cited in support of this conclusion, and so much of the record of that case as is now accessible indicates that no authorities therein were cited to the court. The conclusion therein reached is so opposed to later decisions rendered by this court in Bank, and also to fundamental principles recognized by the decisions generally, that it cannot be now accepted as authority.

The judge of the superior court did not err in sustaining the demurrer to the indictment.

The judgment is affirmed.

Shaw, J., and Van Dyke, J., concurred.

[Crim. No. 1170. Department One.—October 8, 1904.]

THE PEOPLE, Respondent, v. JOHNNY STROMBECK,
Appellant.

CRIMINAL LAW—MARKING COLT TO PREVENT IDENTIFICATION BY OWNER—

SLITTING OF EARS—CUSTOMARY USE.—One who marks a colt belonging to another person by slitting its ears, with the intent thereby to prevent identification thereof by the true owner, is guilty of a felony under section 357 of the Penal Code, regardless of whether such mark might be legally adopted under the provisions of the Political Code, or is customarily used to indicate a vicious animal, and not ownership.

ID.—MATTERS NOT PART OF OFFENSE—PROVINCE OF JURY—QUESTION OF INTENT.—It is not material to the offense that the mark placed upon the colt is not of a character usually adopted to indicate ownership, or that it may not accomplish the purpose of actually preventing identification; though these are matters that may be properly weighed by the jury in determining the intent with which the marking was done.

ID.—CONSTRUCTION OF SECTION—"MARKS."—The word "marks," as used in section 357 of the Penal Code, is not to be limited to the

placing on the animal of some "conventional artificial indication of ownership," but the provision was designed to protect the owners of animals by making it a crime for one to in any way mark the animal of another with the intent thereby to prevent identification.

ID.—SUPPORT OF VERDICT—CONFLICTING EVIDENCE AS TO INTENT.—Notwithstanding the evidence was without conflict as to the customary use of the slitting of ears of horses to indicate a vicious animal, and not ownership, yet where the evidence shows that where the slitting was done the defendant knew that the colt belonged to the true owner, and was not an estray, and the evidence of the circumstances of the case conflicted with the testimony of the defendant upon the question of intent to prevent identification by such owner, the verdict of guilty of the offense charged will not be disturbed upon appeal.

ID.—CHARACTER OF MARK USED—REFUSAL OF REQUESTED INSTRUCTIONS—CHARGE OF COURT.—It was not error to refuse requested instructions as to the character of the mark used, where the instructions given by the court were as liberal as any that the defendant was entitled to in that regard.

APPEAL from a judgment of the Superior Court of Madera County and from an order denying a new trial. **W. M. Conley**, Judge.

The facts are stated in the opinion of the court.

W. H. Larew, and **G. G. Goucher**, for Appellant.

U. S. Webb, Attorney-General, and **C. N. Post**, Assistant Attorney-General, for Respondent.

ANGELLOTTI, J.—An information was presented against defendant, wherein it was charged that he "did willfully, unlawfully, and feloniously mark a certain domestic animal, to wit: A stud colt, belonging to one Thomas Beasore, by then and there slitting the ears of said animals with intent thereby to prevent identification thereof by the true owner, to wit: the said Thomas Beasore." Having been found guilty by a jury, and adjudged to suffer imprisonment in the state prison for two years, he has appealed from the judgment and from an order denying his motion for a new trial.

1. The information states a public offense under the provisions of section 357 of the Penal Code. That section is as follows: "Every person who marks or brands, alters, or defaces the mark or brand of any horse, mare, colt, jack, jen-

net, mule, bull, ox, steer, cow, or calf belonging to another, with intent thereby to steal the same, or to prevent identification thereof by the true owner, is punishable by imprisonment in the state's prison for not less than one nor more than five years."

Under its terms one who in any way marks any animal therein named belonging to another, with intent thereby to prevent identification thereof by the true owner, is guilty of a felony. It can make no difference that the mark placed on the animal is not of a character usually adopted for the purpose of indicating ownership, or that it may not accomplish the purpose of preventing identification. These are matters that may properly weigh with the jury in determining as to the intent with which the marking was done. It is the placing of any mark on such an animal, with the intent thereby to prevent identification by the true owner, that constitutes the crime.

That one who slits the ears of a horse or colt thereby "marks" the same within the ordinary meaning of that word is clear. He thereby places some visible sign or impression on the animal which to some extent changes its natural appearance, attracts the attention, and conveys some information or intimation. That such a mark might tend to impede the owner of the animal in the identification thereof is likewise clear. The statutes recognize that such a mark might be legally adopted as a mark to indicate ownership, for they expressly provide that no person must use a mark "by cutting off the ear or by cutting the ear on both sides to a point." (Pol. Code, sec. 3171.) But it is immaterial in this connection whether the mark in fact used is such that it might be *legally* adopted as a mark under the provisions of the Political Code. It is sufficient that it is a mark, placed on the animal with the unlawful intent.

Counsel for defendant seeks to limit the meaning of the word "marks" as used in this section to the placing on the animal of some "*conventional* artificial indication of ownership," but we find no warrant for such limitation in the plain language of the statutory provision. The portion of the section here involved was designed to protect the owners of animals, by making it a crime for one to in any way mark the animal of another with the intent thereby to prevent

identification by the owner, and we do not see how any mark made with such unlawful intent can be excluded from the operation of the section.

We have considered the other points made in support of the demurrer to the information, and are satisfied that the demurrer was properly overruled.

2. It is contended that the verdict was contrary to the evidence, the particular contention being, that there was no evidence to show the specific criminal intent necessary to complete the crime. The defendant testified substantially as follows: Having gone out "upon the range" to find one of his three colts, he found his colt, and also the stud colt mentioned in the information, with several others, and, never having seen this animal before, he concluded that it was an estray and that he would claim it. He told his companion, Wagner, that it was his colt, and, having driven the horses into Wagner's corral, lassoed this animal, threw it down, branded it with "F. N.," a brand of Wagner, and split its ears. After this had been done and the animal was released, it followed the defendant around the corral, and he saw that it had been theretofore handled. The defendant then concluded that it was not an estray and that he should not have branded him, and the next morning took the colt about two miles from the place, burned out the brand, and turned the animal loose upon the range. He testified that he split the ears simply because he intended to use the horse as a saddle horse, and liked the looks of a saddle horse with split ears; that, although he had been the owner of horses before, this was the first time that he had ever slit the ears of a horse; that he had always understood that when a horse's ears were split it was to signify that the animal was mean or vicious, and that he had never heard of such a thing being done for the purpose of identifying an animal or as a mark of ownership.

There was evidence that the defendant had admitted that at the time he slit the ears of the animal he knew that it belonged to Thomas Beasore.

It was admitted that the defendant branded the colt and slit its ears, and afterwards burned out the brand and turned the colt loose.

The testimony was without conflict to the effect that it has

been a custom for many years to split the ears of vicious or unmanageable horses, that a split in a horse's ear was intended to signify that the horse was vicious, and that such splits are never used as marks of ownership.

The foregoing is substantially all the evidence shown by the record. The defendant acknowledging that he slit the ears of the colt, and there being evidence sufficient to sustain a finding by the jury that at the time he so did he knew that the animal belonged to and was the property of Thomas Beasore, the question remained as to whether the slitting was done for the purpose of preventing identification of the animal by Beasore. Upon this question we cannot say that the finding of the jury is not sustained by the evidence. Where some particular intent is a necessary element to constitute an act a crime, such intent may be sufficiently shown by the circumstances surrounding the commission of the act.

Here, in support of the verdict, it must be assumed that the defendant knew that the colt was the property of Beasore, and that he did not think it was an estray. Under these circumstances he, having taken the animal from the range where it was grazing, placed a brand upon it and slit its ears. The evidence as to the placing of the brand on the animal was of course material and competent upon the question as to what the intention of the defendant was in the slitting of the ears. Both things were done by the defendant at the same time, and apparently, despite defendant's statement to the contrary, for the same purpose. The nature of the act, the thus double marking of the animal by brand and mark, and the circumstances attending the doing thereof, including statements made by defendant which the jury found to be untrue, were sufficient to sustain the finding that the slitting was done for the purpose of preventing identification of the animal. That it might reasonably assist in accomplishing that purpose is very clear, even if such slits are not ordinarily used as marks of ownership, and are generally used simply to indicate a vicious animal. The statement of the defendant as to his reason for thus marking the animal was of course not conclusive upon the jury. The most that can be said for defendant is, that there was a conflict in the evidence as to the intent with which the act was done, and the well-settled rule that the appellate court will not under such circumstances

disturb the finding of the jury prohibits us from interfering therewith.

The case of *Fossett v. State*, 11 Tex. App. 40, 45, relied on by defendant, fully recognizes the rule that "the surrounding facts—the facts and circumstances which hover around and give character to the act"—are to be taken into consideration in determining as to the intent with which such an act as is here involved is done.

3. Complaint is made that the court refused to give certain instructions requested by the defendant. We have examined these requested instructions and find no error in the action of the court. The court did instruct the jury that before they could convict the defendant they must be convinced by the evidence beyond a reasonable doubt that the slitting of the horse's ears was such a marking of an animal as might prevent the identification thereof by the true owner, and this was certainly as liberal an instruction in regard to the character of the mark as the defendant was entitled to. As has been said before, it is the placing of any mark upon the animal with the intent thereby to prevent identification by the owner that is denounced by the statute here involved. Whether the mark adopted by the offender for that purpose is such that it will accomplish the result desired is not material. What the statute really makes an offense is an attempt to prevent the identification of the animal by the true owner by the placing of a mark thereon. As in the case of an attempt to commit a crime, it is not essential that the means used should in fact be capable of accomplishing the result designed. The jury were very fully instructed that they could not convict the defendant unless they were satisfied beyond a reasonable doubt that the defendant slit the animal's ears for the purpose of preventing its identification by the true owner.

The judgment and order are affirmed.

Shaw, J., and Van Dyke, J., concurred.

[S. F. No. 2937. Department One.—October 8, 1904.]

CLARA BAUM, Administratrix, etc., Respondent, v. EDWARD ROPER et al., Defendants; DAVID J. SPENCE, Appellant.

APPEAL FROM JUDGMENT—REVIEW.—Where an appeal, though taken within proper time after the entry of the judgment against the appellant, was taken more than four years after its rendition, the objection that the evidence does not support the decision of the trial court cannot be considered.

ID.—CONSTRUCTION OF FINDINGS—RECOVERY OF REAL PROPERTY IN SAN FRANCISCO—DEFENSE OF STATUTE OF LIMITATIONS—ACT OF 1864.—In an action to recover real property in San Francisco, where the answer pleaded that the action was barred by the provisions of section 318 of the Code of Civil Procedure, and also pleaded the act of March 5, 1864, a finding that the action is not barred by the provisions of section 318 is equivalent to a finding against the truth of the allegation in the answer under the act of March 5, 1864, that neither plaintiff nor his privies in estate have been in possession of the property within five years next before the beginning of the action, and the omission specifically to find on such allegation is not material.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Charles W. Slack, Judge, rendering judgment. James M. Troutt, Judge, amending judgment.

The facts are stated in the opinion of the court.

J. B. Mhoon, and T. M. Osmont, for Appellant.

W. B. Kollmyer, and Naphtaly, Freidenrich & Ackerman, for Respondent.

SHAW, J.—This is a second appeal from the judgment rendered in the superior court on February 6, 1897. The judgment as rendered was against all the defendants, but the clerk, by inadvertence in making the entry thereof, failed to insert the name of the present appellant, David J. Spence, in the judgment as entered. This omission was not observed, however, at the time, and all the defendants joined in an appeal to this court, and the judgment was affirmed. (See *Baum v. Roper*, 132 Cal. 42.) In the subsequent decision in

Spence v. Troutt, 133 Cal. 605, (erroneously reported as *Spencer v. Troutt*,) it was held that, so far as Spence was concerned, the first appeal, although the opinion showed a full consideration of all the points in the case, and was rendered after hearing argument in his behalf, was nevertheless a nullity, because as to him the judgment was not entered, and this court could not acquire jurisdiction of an appeal taken from a judgment before the entry thereof, and that Spence had the right to take an appeal within six months from the time of the amendment inserting his name therein. This amendment was made on May 29, 1901, and this appeal was taken on June 7, 1901.

Inasmuch as this appeal was taken more than four years after the *rendition* of the judgment, it is apparent that we cannot consider the objection that the evidence does not support the decision of the trial court. (Code Civ. Proc., sec. 939, subd. 1.) We have, however, re-examined the evidence and reconsidered the points presented on the first appeal and decided by this court in *Baum v. Roper*, 132 Cal. 42, and are satisfied with the conclusions there reached upon a consideration of the same record.

The appellant now makes the additional point that the judgment is erroneous because there is no finding on the issue tendered by the answer relating to the effect of the act of March 5, 1864, upon the right of the plaintiff to maintain the action. The act provides that in any action begun more than one year thereafter for the recovery of real property in San Francisco, or affecting the title thereto, none of the provisions of the act of March 11, 1858, ratifying certain ordinances of San Francisco, nor any of the provisions of the ordinances therein recited, should be deemed to aid the right or title set up or claimed by any party, unless such party, or his privies in estate, shall have had actual possession of the land in dispute within five years next before the commencement of the action. The answer pleaded this statute, and alleged that neither the plaintiff nor his predecessors in interest had had the actual possession of the land within five years next before the beginning of the action. There is no express finding upon these allegations. We are of the opinion, however, that the findings made include a finding upon the facts set forth in the answer. The answer alleged that the

action was barred by the provisions of section 318 of the Code of Civil Procedure. This is merely a statutory method of alleging the facts which, under that section, constitute a bar to the action,—namely, that the plaintiff and his predecessors have not been seized or possessed of the property within five years next before the commencement of the action. This is substantially the same as the allegation aforesaid intended to invoke the operation of the act of 1864. The court finds that the action is not barred by the provisions of said section 318. In substance, this is the same as a finding that the allegation that neither plaintiff nor his privies in estate have been in possession of the property within five years next before the beginning of the action is not true. There was no evidence or claim that either of them were under any disability. Therefore it does, in substance, amount to a finding on the issues tendered by the answer.

We have considered this point on the theory that there was evidence sufficient to require such a finding with respect to the effect of the act of 1864. The appellant, however, does not cite us to any evidence showing that the plaintiff required aid from the act of 1858 or the ordinances referred to in that act in order to establish his title. The title seems to be established by proof of adverse possession long after that act took effect, and irrespective of any deraignment of title from the city of San Francisco.

The judgment is affirmed.

Angellotti, J., and Van Dyke, J., concurred.

[S. F. No. 8992. Department One.—October 8, 1904.]

In the Matter of the Estate of ELLA ROBERTA WILSON SMITH, Deceased. ELLA J. CHAMBERLAIN, Appellant, v. BUTLER SMITH et al., Respondents.

WILLS—INHERITANCE BY POST-TESTAMENTARY CHILD—CONTRIBUTION BY DEVISEES AND LEGATEES—ANNUITY TO MOTHER OF TESTATOR.—A child born after the making of the last will of a deceased testator is entitled to inherit the same share of the estate as if no will were made, and all devisees and legatees must contribute proportionately

to such share, if there is no obvious intention of the testator to the contrary. In the absence of such obvious intention shown from the words of the will, a specific monthly annuity bequeathed by the testatrix to her mother must, as a legacy, contribute a proportionate share of such inheritance.

ID.—CHILD ABOUT TO BE BORN—PRESUMED KNOWLEDGE OF LAW—OBVIOUS INTENTION NOT SHOWN.—The fact that the testatrix was soon to give birth to a child when the will was made is not sufficient proof of an obvious intention that the legacy of the annuity given to the mother should not contribute to the legal inheritance of the post-testamentary child. Though she was probably actually ignorant of the law as to such inheritance, she must be presumed to know it, and to know that the mother must contribute proportionately thereto, unless a contrary intention was made manifest by the terms of the will.

APPEAL from a decree of the Superior Court of the City and County of San Francisco making partial distribution of the estate of a deceased person. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Wright & Lukens, and John A. Wright, for Appellant.

The probable immediate confinement known to the testatrix when the will was made shows her intention that the father should take the share given by the will and support the child, and that her mother's legacy should be intact. (Civ. Code, sec. 1308; *Peters v. Siders*, 126 Mass. 135.¹)

Garret W. McEnerney, for Respondents.

In cases of proportionate abatement annuities stand upon the same basis as legacies, unless a contrary intention clearly appears from the will. (2 Williams on Executors, 1220-1221, 1367; Underhill on Willa, secs. 391, 392; *Estate of Gray*, 13 Phila. 372; *Emery v. Batchelder*, 78 Me. 233; *Croly v. Weld*, 3 De Gex, M. & G. 996; *Wroughton v. Colquhoun*, 1 De Gex & S. 351; *Ward v. Gray*, 26 Beav. 485.)

ANGELLOTTI, J.—This is an appeal by Ella J. Chamberlain, the mother of deceased, from a decree of partial distribution, refusing to award her \$125 per month for the period of her life, and awarding her only \$83.33 $\frac{1}{3}$ per month for that period.

¹ 30 Am. Rep. 671.

The will of the deceased was as follows: "I, Ella Roberta Wilson Smith, being of sane and sound mind do hereby declare this my last will, and do hereby give and bequeath all of which I may die possessed, to my beloved husband to be for his benefit and maintenance during his life. At his death to go to my beloved daughter Roberta Genevieve Smith.

"To my mother I desire shall be paid \$125.00 per month as long as she shall live.

"ELLA ROBERTA WILSON SMITH.

"February 1st, 1903."

Six days after the making of this will the deceased gave birth to a son, and on February 27, 1903, twenty days after the birth of such son, she died, leaving surviving her husband and mother, and her two children, Roberta Genevieve and Randolph Wilson, the post-testamentary son.

She left estate consisting of personal property valued at two hundred dollars and real property valued at \$99,175, all of which was separate property. The net income from this property was three hundred dollars per month.

No part of the annuity to the mother having been paid, she petitioned the court in probate for a decree directing the administrator with the will annexed to pay and deliver to her the arrears of the said annuity at the rate of \$125 per month, as provided in the will.

The court decreed that she was entitled to receive only \$83.33 $\frac{1}{3}$ per month, and ordered this amount paid to her from March 27, 1903, "so long as she shall live," and she has appealed, claiming that under the provisions of the will she is entitled to \$125 per month.

The question presented by this appeal is as to the effect upon the annuity to the mother of the birth of the post-testamentary child, in view of certain provisions of our Civil Code. Section 1306 of the Civil Code is as follows: "Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate."

It is not disputed that the post-testamentary child comes

within the terms of this section and is entitled to the benefit of its provisions. Therefore, subject to the provisions of section 1308 of the Civil Code, and subject to administration, the post-testamentary child succeeded immediately, by operation of law, to an undivided one third of the property of the testatrix. As to such portion, the deceased is to be regarded as having died intestate (*Smith v. Olmstead*, 88 Cal. 582¹), and, so far as such child is concerned, the will is to be considered as not existing.

The effect of this being to deprive both the husband and the daughter of one third of the portions attempted to be given them by the will, the question is as to whether the annuity to the mother must also be cut down one third.

Section 1308 of the Civil Code provides that "When any share of the estate of a testator is assigned to a child born after the making of a will, or to a child, or the issue of a child, omitted in the will, as hereinbefore mentioned, the same must first be taken from the estate not disposed of by the will, if any; if that is not sufficient so much as may be necessary must be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest, or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy, or provision may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted."

Concededly, the annuity here involved is a legacy. (Civ. Code, sec. 1357.) There is no estate not disposed of by will. The legacy to the mother of deceased must therefore contribute, in proportion to its value, to make up the share of the child, unless the obvious intention of the testatrix in relation to such legacy, as distinguished from her intention as to the other dispositions made by the will, would thereby be defeated.

No such obvious intention is apparent from the words of the will. As stated by this court in *Estate of Ross*, 140 Cal. 282, 293, "The general rule announced by the section (Civ. Code, sec. 1308) is, that all devises and legacies must contribute in proportion to value, and that the exemption of a

¹ 22 Am. St. Rep. 336.

specific devise is only warranted when the *obvious intention* of the testator in relation to it would be defeated if contribution was required." By the will in that case a lot of land was specifically devised to a stepdaughter, and, with the exception of two nominal legacies, the residue of the property was bequeathed to two daughters, and it was held that the pretermitted child of a deceased child succeeded to an undivided one third of the whole of the property, including that specially devised, and that the specific and residuary bequests must alike contribute in proportion to value. The mere fact, then, that one legacy is specific, as is claimed by appellant for the annuity here involved, and that another legacy is in its nature residuary, does not show the obvious intention contemplated by section 1308 of the Civil Code. Under that section all legacies and devises, whatever their character, must contribute in such a case, unless the obvious intention of the testator in relation to some particular legacy or devise would be thereby defeated.

By her will the deceased purported in terms to dispose of *all* her property. She must be assumed to have had in mind all her property and its condition, and to have distributed the same among the objects of her bounty *in such proportions* as she thought proper. The amount fixed upon by her for her mother must be deemed to have been so fixed not only in accordance with her views as to her mother's needs, but in accordance with her views as to what under all the circumstances, including the needs of all, would be a fair division among those near and dear to her. There is absolutely nothing in the language of the will to indicate any other intention on the part of the testatrix than that, the husband holding during his life *all* the property of which she died possessed, and her daughter taking *all* of the same absolutely upon his death, the mother should receive \$125 per month therefrom during her life. These were the proportions deemed just by the testatrix. The intention that the portions of the estate thus attempted to be given to the father and daughter were to be enjoyed by them unimpaired, was as obvious as the intention that the mother should have the full amount of her legacy. There is nothing to indicate that the legacy to the mother was under all circumstances to be kept intact, in the event that the bequests to the father and daughter be-

came in part ineffectual. So much for the language of the will.

Appellant claims, however, that the circumstances under which the will was made must be taken into consideration in determining the intention of the testatrix, and invokes the provisions of section 1318 of the Civil Code, which declares that "In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will taking into view the circumstances under which it was made exclusive of his oral declarations."

Assuming the applicability of this section, and that we may consider the circumstances under which the will was made for the purpose of determining the "obvious intention" of the testatrix in this regard (see, however, *Estate of Ross*, 140 Cal. 282; *In re Stevens*, 83 Cal. 322;¹ *Estate of Wardell*, 57 Cal. 484; *Estate of Tompkins*, 132 Cal. 173, 176), we do not see that the case of appellant is materially strengthened. The circumstance strongly relied on by her is, that at the time of the execution of the will the deceased was within a few days to give birth to a child. It was urged that she must therefore have had this child in mind, and made this will because of her approaching confinement and the danger attending the same. The child, therefore, it is said, must have been in her mind, and she must be presumed to have known that such child, if born alive, would under the law succeed to one third of her estate, and to have made the provision of \$125 per month for her mother with the intention that she should be paid that sum in full, notwithstanding the fact that the estate from which said annuity was to be paid would be reduced one third by the birth of the child.

The provisions of the will would indicate that if the testatrix had this child in mind at the time of the execution of the will, her omission to provide for him was intentional, and that she in fact did not know that the law would give him one third of her estate if she failed to provide for or mention him in her will. It is impossible to account for her attempted disposition of *all* of her property to others, under such circumstances, upon any other theory. Assuming, however, in accordance with the presumption invoked, that she did know the

¹ 17 Am. St. Rep. 252.

law, she knew not only that if the child was born alive, and had not been provided for or mentioned in her will, he would succeed to one-third of her estate by operation of law, but also that under the law, unless her intention to the contrary was made obvious by the terms of her will, all devises and legacies contained therein, including the legacy to her mother, must contribute in proportion to value to make up the share of the child. Having this knowledge, she executed the will before us, without indicating therein any intention that the legacy to the mother should not contribute with the others to make up the portion that the law would give to her after-born child, or that such legacy should in this respect stand upon any other footing than that occupied by the other bequests.

We are satisfied that it is not shown by the will, either taken alone or in connection with the circumstances under which it was made, that there was any such "obvious intention" in relation to the annuity to the mother as will exempt it from contribution to the share of the post-testamentary child.

The decree of the superior court is affirmed.

Shaw, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[S. F. No. 3069. Department One.—October 12, 1904.]

CALIFORNIA ELECTRIC LIGHT COMPANY, Respondent, v. CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY, Executors, etc., and LAURA B. ROE, Executrix, etc., of George N. Roe, Deceased, Appellants.

CORPORATION — SECRET COMMISSION RECEIVED BY OFFICER — ACTION AGAINST EXECUTORS — EVIDENCE — MOTIVES OF WITNESS ASSAILED — REBUTTAL.—In an action by a corporation against the executors of a deceased officer and manager, to recover a secret commission received by him upon sale of its property, where the motives of a witness for the plaintiff, who testified to his sharing a commission with such officer, were assailed by the executors' counsel for having concocted the story after the officer's death, in revenge for disallow-

ance of a claim by him against the estate, it was proper, in rebuttal of such charge, to admit letters addressed by the witness to the officer in his lifetime making the same claim, and, for the same limited purpose, to admit other letters and declarations of the witness in relation to sharing the commission, made prior to the death or to the presentation of the claim against the estate.

Id.—INFLUENCE UPON JURY—EQUITY CASE—ADVISORY VERDICT—REVIEW UPON APPEAL.—If the jury were influenced in their verdict by the evidence admitted before them for a limited purpose, this would not justify a reversal of the judgment against the accused in a case in equity. In such a case the verdict is at most only advisory to the court; and where the court acted upon its own judgment, and, in addition to approving the special verdict, made and filed its own findings and decision, the correctness of the decision of the court, and not of the verdict as rendered by the jury, is the question to be determined upon appeal.

Id.—FINDING AS TO AMOUNT—INFERENCE FROM EVIDENCE.—Where there is evidence tending to sustain the finding of the jury and court as to the amount and value of the stock received by the defendant as a secret commission, it was for the court to determine the proper construction of the testimony and the inference of fact to be drawn therefrom; and the fact that the evidence might warrant a different inference does not justify this court in disturbing the finding for want of evidence.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Charles W. Slack, Judge.

The facts are stated in the opinion of the court.

Page, McCutchen, Harding & Knight, for Appellants.

The court erred in admitting letters and declarations of the witness Lloyd, which were hearsay. (1 Wigmore's Greenleaf on Evidence, sec. 469b; *Elliott v. Pearl*, 10 Pet. 412, 439; *Robb v. Hackley*, 23 Wend. 50; *Aetna Ins. Co. v. Eastman*, 95 Tex. 34; *People v. Doyell*, 48 Cal. 85, 90; *Mason v. Vestal*, 88 Cal. 396;¹ *People v. Rodley*, 131 Cal. 255; *Rulofson v. Billings*, 140 Cal. 152; *Barkly v. Copeland*, 74 Cal. 1;² *Silva v. Packard*, 10 Utah, 89; *Ewing v. Keith*, 16 Utah, 312; *Train v. Taylor*, 51 Hun, 215; *People v. Colburn*, 105 Cal. 645; *Casey v. Leggett*, 125 Cal. 664; *People v. Lee Dick Lung*, 129 Cal. 491; *Learned v. Tillotson*, 97 N. Y. 1, 11;³ *Bank of British North*

¹ 22 Am. St. Rep. 310.

² 49 Am. Rep. 508.

³ 5 Am. St. Rep. 413.

America v. Delafield, 126 N. Y. 410; *Thomas v. Gage*, 141 N. Y. 506; *Percy v. Bibber*, 134 Mass. 404; *Morris v. Norton*, 75 Fed. 912; *Sullivan v. McMillan*, 26 Fla. 543; *Canadian Bank v. Coumbe*, 47 Mich. 358; *Dempsey v. Dobson*, 174 Pa. St. 122;¹ *State v. Howell*, 61 N. J. L. 142; *Razor v. Razor*, 149 Ill. 624; *Wiedemann v. Walpole*, 2 Q. B. Div. (1891) 534.)

W. E. Goodfellow, and Garret W. McEnerney, for Respondent.

On the issue tendered by appellants as to whether the evidence of Lloyd was concocted after the presentation and disallowance of his claim against the estate of George H. Roe, the letters and declarations of Lloyd were admissible to show the contrary, and remove the false imputation. (*Barkly v. Copeland*, 74 Cal. 1;² *Gates v. People*, 14 Ill. 433, 438; *State v. Dennin*. 32 Vt. 158; *State v. Vincent*, 24 Iowa, 570;³ 1 Greenleaf on Evidence, 16th ed., sec. 469, par. 4, p. 607; *McLain v. British etc. Marine Ins. Co.*, 38 N. Y. Supp. 77, 79; 16 Misc. Rep. 336; *Baber v. Broadway etc. Co.*, 29 N. Y. Supp. 40, 42; 9 Misc. Rep. 20; *In re Hesdra's Will*, 119 N. Y. 615, 617; *Herrick v. Smith*, 13 Hun, 446; *Gilbert v. Sage*, 57 N. Y. 639, 640; *Robb v. Hackley*, 23 Wend. 50, 53; *Hotchkiss v. Germania Fire Ins. Co.*, 5 Hun, 90; Wharton on Criminal Evidence, sec. 492; *Howard v. Commonwealth*, 81 Va. 488, 490; *Baltimore etc. R. R. Co. v. Knee*, 83 Md. 77, 88; *State v. Flint*, 60 Vt. 304, 316; *French v. Merrill*, 6 N. H. 465, 467.) No reversible error was committed. (Code Civ. Proc., sec. 475; *Redfield v. Oakland etc. Ry. Co.*, 112 Cal. 221; *Glenmore Distilling Co. v. Craig*, 128 Cal. 264, 268.)

VAN DYKE, J.—This was an action to recover a secret commission claimed to have been received by the defendants' testator while an officer of the plaintiff corporation on the sale by plaintiff of certain of its property. From a judgment for plaintiff and an order denying defendants' motion for a new trial the defendants now prosecute this appeal.

George H. Roe, of whose last will and testament the defendants are executors and executrix respectively, was in his lifetime the secretary and manager of the plaintiff, California

¹ 52 Am. St. Rep. 816.

³ 85 Am. Dec. 753.

² 5 Am. St. Rep. 413.

Electric Light Company. The plaintiff was incorporated prior to 1890. The cause of action here arose in the years 1892 and 1893. Mr. Roe died December 10, 1894. The action is based upon a claim duly presented to the executors and by them rejected..

The action is one in equity for an accounting against the executors of the will of George H. Roe, deceased, and the defendants requested the court below to impanel a jury to advise it upon the issues raised by the pleadings; and, at their request, certain interrogatories were submitted, which, together with the answers of the jury, are as follows:—

“1. Was there a secret agreement made between George H. Roe and C. R. Lloyd by which, in consideration of his assistance to be rendered in procuring a commission to be allowed and paid by the plaintiff, the California Electric Light Company, of one thousand shares of the capital stock of the Edison Light and Power Company, George H. Roe should receive one half of said commission?

“Yes.

“2. Did George H. Roe, pursuant to such secret agreement, receive one half of such commission, to wit: five hundred shares of the capital stock of the Edison Light and Power Company?

“Yes.”

The trial of the cause occupied pretty much all the month of November, 1897. Thereafter—to wit, March 15, 1898—the court adopted the verdict of the jury and made additional findings of fact and stated the account between the parties, and awarded a judgment in favor of the plaintiff for \$71,324.26, payable in due course of administration, with legal interest from that date. The appellants rely for a reversal upon four rulings of the court upon the admission of evidence, and upon insufficiency of evidence to support the findings. The four rulings of the court referred to are designated as exceptions No. 9, 10, 37, and 42.

Exception No. 9 was taken to the admission of a letter of August 6, 1894, written by Lloyd at New York to Roe in San Francisco, and contained, as Lloyd stated, in an envelope returned to him by Mrs. Roe after Roe's death, with the indorsement: “Letter from C. R. Lloyd to be returned to him

unopened in case of my death." The theory of the defendants, as developed at the trial, was, that Lloyd, who was the principal witness on behalf of the plaintiff, was actuated by a motive of revenge against Roe's executors for having failed to comply with his demand for the payment of his claim against said estate of twenty-one thousand dollars, and it is also the contention of the defendants that this suit was instigated by Lloyd after his claim against Roe's estate had been rejected. In seeking to show that this was the case, Mr. McCutchen, counsel for defendants, on cross-examination of Lloyd, asked the following questions:

"Q. After he was dead you made a claim against his estate to recover twenty-one thousand dollars of it back?

"A. Before he died I wrote—

"Q. [Interrupting.] Just answer my question, please.

"A. I made the claim when he was living.

"Mr. McCutchen.—I insist upon an answer to the question, and if the witness has any explanation he can make it. . . .

"The Court.—You will have to answer that question, Mr. Lloyd. I will let that portion stand, 'I made the claim while he was living.' The question virtually is, Did you make the claim after he was dead?

"Mr. McCutchen.—That is my question.

"A. I made it during his lifetime, and after he was dead, and you know it, in both instances.

"The Court.—Mr. Lloyd, I have cautioned you several times now about making these remarks.

"The Witness.—I beg your pardon.

"The Court.—Strike out that 'and you know it.' "

Upon redirect examination counsel for the plaintiff produced and submitted to Mr. Lloyd a letter which he had written on August 6, 1894, to George H. Roe. After Mr. Roe died this letter was returned to Mr. Lloyd by Mrs. Roe, the widow of George H. Roe, in a sealed envelope, and had indorsed upon it, in the handwriting of George H. Roe: "This letter is to be returned to Charles R. Lloyd, unopened, in the event of my death." The plaintiff then offered the letter in evidence. After some discussion between court and counsel in reference to the admission of the letter, the court put this question to defendants' counsel: "Is it your theory, Mr. McCutchen, that this claim is an afterthought, and pressed by

Mr. Lloyd because his own claim against the Roe estate was rejected?

"Mr. McCutchen.—Yes, sir.

"The Court.—That is your theory?

"Mr. McCutchen.—Yes, sir.

"The Court.—Well, then, that will settle it. If that is true, then this letter is admissible upon that theory, as showing that the claim was made prior to the institution—or rather the claim involved in this suit was made prior to the claim against the Roe estate. This letter is dated August 6, 1894.

"Mr. McCutchen.—I understand your honor does not admit this letter as an admission of Mr. Roe?

"The Court.—No, sir."

The letter referred to was written from New York, as stated August 6, 1894, and is quite lengthy, going over many matters that seemed to have occurred between Lloyd and Roe in reference to the Electric Light Company and the Edison Company. He says in the letter, among other things: "I have no desire to quarrel with you and will avoid doing so unless it becomes necessary to protect the company from injury. If that occasion should arise, it will mean your resignation, and the return by you to the California Electric Company of the \$71,000 I gave you of the \$100,000 worth of stock paid to me." The registered letter receipt and the registered return receipt were also read in evidence, and the envelope with the indorsement as stated.

The Code of Civil Procedure (sec. 2048) reads as follows. "The opposite party may cross-examine the witness as to any facts stated in his direct examination, or connected therewith and in so doing may put leading questions; but if he examines him as to other matters, such examination is to be subject to the same rules as a direct examination." In this case the attorney of defendants, in the cross-examination referred to, examined the witness as to other matters than those testified to by him on the direct examination, and in effect presented a new issue,—that is, that after the executors in the Roe estate had rejected the claim of Lloyd for twenty-one thousand dollars he instigated the bringing of this suit, and had invented or concocted the claim that Roe had received half of his commission and retained the same. It was proper, therefore, on

redirect examination to admit the evidence in question, as showing that the claim was made prior to the institution of the suit and prior to the claim against the Roe estate, in corroboration of the witness Lloyd's testimony to that effect, and the court, it seems, was very careful to limit it to that purpose. On this subject in *People v. Doyell*, 48 Cal. 90, the court say: "Such declarations may, however, be admissible in contradiction of evidence tending to show that the account is a fabrication of late date, when it may be shown that the same account was given before its ultimate effect and operation could have been foreseen; and also, perhaps, in other peculiar cases." And in *Barkly v. Copeland*, 74 Cal. 4,¹ it is said: "It has been frequently held that when the witness is charged with testifying under the influence of some motive prompting him to make a false statement, it may be shown that he made similar statements at a time when the imputed motive did not exist." (Citing a number of cases from other jurisdictions, and Wharton on Evidence, sec. 570.)

In response to the cross-examination of Lloyd he was permitted to testify without objection as follows: "I had said to Mr. Roe in his lifetime that he had received \$71,000 out of this transaction. On one occasion I wrote to him in Santa Barbara while he was there. I wrote to him on several occasions with respect to that, and I wrote him from New York some time in the latter part of 1894—that letter was returned to me some time after his death." Again, without objection: "In the lifetime of Mr. Roe I made a claim against him for the return of \$21,000. I once wrote him a letter to Santa Barbara. I have the original letter in pencil from which the letter to Mr. Roe was copied. I wrote it out myself in ink from the pencil copy. I retained the pencil copy, and have it with me. I left the finished draft with Miss Buttner at Sunol, where I was staying for a few days, to mail. I inclosed the letter in an envelope and addressed it to George H. Roe, at the Arlington Hotel, Santa Barbara. He was there at the time. After the letter was inclosed in an envelope and addressed, I left it at the Buttner house in Sunol with directions to mail it." Miss Buttner, the stenographer, was permitted to testify to the writing and mailing of the letter of February 18, 1894, without any objection. This letter was admitted by the court

¹ 5 Am. St. Rep. 413.

for the sole purpose of showing that Lloyd did not invent the claim that Roe had received half of his commission after Lloyd's individual demand against the Roe estate was rejected, and was limited to that purpose, and not admitted as an admission on the part of Roe of the truth of the contents of the letter. In the letter, which is quite lengthy, he calls the attention of Roe again to the seventy-one thousand dollars which he had received as half of the commissions in the transaction referred to in the New York letter, saying: "You are not entitled to more than one half the San Francisco commission, and if that stock deal or the sale of the Engineering Co. does not go through soon, I hope you are man enough to refund me that \$21,000 without my having to press you for it. I wish to be on friendly terms with you and regret much more than you do our present differences." Upon the authorities referred to in support of the ruling of the court in reference to the New York letter it was not error to admit the letter written to Roe at Santa Barbara. This is the second point urged by appellants in support of their contention for a reversal, and it is designated as exception No. 10 in the transcript.

P. B. Cornwall, who was president of the plaintiff corporation during the transactions out of which the suit in question arose, was asked whether he ever had a conversation with the witness Lloyd relating to the thousand shares which were voted to him by the California Electric Light Company. It was stated by plaintiff's counsel that the purpose was to prove that he told Mr. Cornwall, as Lloyd had stated in his testimony, that he had divided the commission he received with Roe.

"The Court.—I want to know first, Mr. Cornwall, when this conversation occurred?

"A. It occurred between four and six months before Mr. Roe's death. I think it was in July, but it may have been about the first of August. It was a street conversation. Mr. Lloyd stopped me near the Merchants' Exchange, and spoke about selling me some electric light machinery. I did not care to buy. I had suffered through former connections, and it led to a conversation about the transactions he had had with the California Electric Light Company, and I think I put my hand on his collar and put it to him very squarely: 'Did

not Mr. Roe get a portion of that commission that you got from the California Electric Light Company, that thousand shares of stock?' He hesitated a moment, and answered that he got more than half of it. I was president of the California Electric Light Company during 1891 and some of 1892. I was president as long as I remained director. The negotiations between the California Electric Light Company and the Edison people went on for over a year, I think commencing before 1891."

The court overruled defendants' objections to this testimony, which is noted as exception No. 37 and the third point made by appellants in support of their contention for a reversal. The testimony was properly admitted to refute the assumption of defendants' counsel in the cross-examination of the witness Lloyd that the matter referred to had been concocted by Lloyd after the death of Roe and after his claim on the Roe estate had been rejected. The court below, as in the case of the letters already referred to, was careful to limit this testimony to this purpose.

The fourth point made by appellants in support of their contention for a reversal is based upon the admission of a letter from Lloyd to Cornwall referring to this conversation. In his cross-examination it appeared that, upon the death of Roe, Lloyd telegraphed to Cornwall telling him that Roe had died, and to await an important letter mailed the day before. On redirect examination the telegram was admitted in evidence, and an extract from a letter dated December 8th, two days before Roe died, was also admitted in evidence, which reads as follows: "Please consider this letter confidential, as you did a statement I made to you at the Merchants' Exchange in July of this year." This constitutes exception No. 42. As in the cases of the preceding letters and conversations, this was properly admitted for the purpose of refuting the charge assumed on the cross-examination that Lloyd had concocted the story after the death of Roe, and after his claim on the Roe estate had been rejected; and if in admitting this evidence, or in the reading of the letters in question, the jury in any way could have been influenced in returning their verdict, this would not justify a reversal. The case was in equity, and the verdict of the jury was at most only advisory to the court. The court in adopting the verdict of the jury

acted upon its own judgment, and in addition thereto filed its own findings and decision. The correctness of the decision of the court, and not the verdict as rendered by the jury, is the question to be determined here. (*Fisher v. Zumwalt*, 128 Cal. 493; *Schneider v. Brown*, 85 Cal. 205; *Sweetzer v. Dobbins*, 65 Cal. 529; *Richardson v. Eureka*, 110 Cal. 446; *Scheerer v. Goodwin*, 125 Cal. 154.)

In the fifth point made by appellants for reversal it is claimed that the evidence does not support the judgment in reference to the amount found due. In other words, that the judgment is in excess of the amount which should have been rendered. The commissions sued for were paid in stock, as found by the jury. The amount of the judgment was dependent upon the number of shares of stock. The court in its finding stated that the five hundred shares received by Roe were delivered in two lots, the first lot being four hundred shares out of a certain lot of seven hundred and eighty-six shares received by Lloyd from the plaintiff, and the second being one hundred shares, out of a lot of two hundred and eighty shares subsequently delivered by Lloyd to Roe. The evidence discloses that there was another deal between Lloyd and Roe by which Lloyd was to deliver to Roe three hundred and seventy-five shares of the same stock at the same price, one hundred dollars per share, and that expenses were incurred by Lloyd amounting to thirty-nine thousand dollars, one half of which was charged to Roe. In order to make up the amount of money that was due from Lloyd to Roe, counting the shares as money at one hundred dollars each, it is necessary to take the four hundred shares at forty thousand dollars, the two hundred and eighty shares at twenty-eight thousand dollars, and one half of the expenses, or nineteen thousand five hundred dollars, which makes a total of eighty-seven thousand five hundred dollars. The objection of the appellant is, that the court charged the expenses against the shares due to Roe upon the other transaction, the one not here in issue; whereas the appellants claim that it should have been divided between the two transactions, and a part of the expense charged against the other transaction and the remainder charged against the transaction here in issue, and hence it would not be in accordance with the evidence to charge one hundred of the last lot of two hundred and eighty shares against this

transaction, but that the evidence requires the charge of a somewhat less amount instead. It is evident, however, that if the one hundred shares of the last lot of two hundred and eighty shares was appropriated by the parties themselves to make up the total of five hundred shares due upon the transaction here in issue, the court would be fully justified in making the same appropriation and rendering judgment accordingly. There is evidence tending to show that the last one hundred of the five hundred shares was so appropriated out of the two hundred and eighty shares included in the last lot. Lloyd testified as follows: "Besides the delivery of the 400 shares of stock to Mr. Roe, I gave him 280 shares more. . . . The 280 shares were given to him to make up the half of the total commission made in New York and San Francisco, stating the amounts that I received from the California Electric Light Company at \$100,000 and the amount that I received in New York at \$75,000, amounting to \$175,000." He then mentioned the items of expenses amounting to thirty-nine thousand dollars, and, continuing, said: "I gave Roe \$71,000; \$3,000 with my note and 680 shares of stock, or \$68,000 in cash. The 680 shares was one half of the total net commission of \$100,000 and \$36,000." If the whole of the expenses—thirty-nine thousand dollars—was deducted from the seventy-five thousand dollars due by the other transaction, it would leave a remainder of thirty-six thousand dollars. This testimony seems to indicate that the five hundred shares were appropriated and delivered to Roe upon the transaction here in question without any reduction for expenses. He testified to other facts in connection with these which seemed to contradict this inference, or at least to show that the expenses should not have been so apportioned, but it was for the court below to determine what was the proper construction of this testimony, and the fact that it might warrant a different inference does not justify us in setting aside the verdict for want of evidence. We think it must be held that the evidence supports the judgment in this particular.

The judgment and order appealed from are affirmed.

Shaw, J., and Angellotti, J., concurred.

Hearing in Bank denied.

[S. F. No. 3823. In Bank.—October 14, 1904.]

CHARLES M. McCARDLE, Respondent, v. R. N. BARSTOW, Appellant.

ELECTION CONTEST—VERIFICATION OF STATEMENT—CASE AFFIRMED.—

The verification of the statement of an election contest may be in the ordinary form of the verification of a pleading. (*Kirk v. Rhoads*, 46 Cal. 403, affirmed.)

ID.—EVIDENCE—PRESERVATION OF BALLOTS—DISCRETION—REVIEW UPON APPEAL.—Upon the contest of an election the question whether the ballots were safely preserved in their original condition is largely within the judgment and discretion of the trial court; and if the evidence fairly warrants its conclusion, its determination of that question will not be disturbed upon appeal.

ID.—OBJECTION TO UNCOUNTED PRECINCTS—WAIVER BY CONTESTANT—PROOF BY CONTESTEE—ADMISSIBILITY—ESTOPPEL.—The contestant, after establishing a majority in counted precincts, had the right to waive his objection to misfeasance and malconduct alleged by him in other uncounted precincts; and where the contestee offered the ballots in the remaining precincts, he cannot be heard to say that the ballots offered by him were not admissible, or were not safely preserved.

ID.—DISTINGUISHING MARKS.—Ballots stamped with a cross after the words "No nomination" have a distinguishing mark, and were properly rejected.

APPEAL from a judgment of the Superior Court of Fresno County. E. N. Rector, Judge presiding.

The facts are stated in the opinion of the court.

F. H. Short, M. B. Harris, and Johnston & Jones, for Appellant.

The proof did not establish that the ballots were safely preserved. The burden of proof is upon the contestant to show that they were not exposed. (*Farrell v. Larsen*, 26 Utah, 283; *Colgan v. Beard*, 65 Cal. 58.) An exposure destroys the presumption of correctness, and renders the ballots inadmissible. (*Powell v. Holman*, 50 Ark. 86; *People v. Cicott*, 16 Mich. 283;¹ *Newton v. Newell*, 26 Minn. 529; *Martin v. Miles*, 40 Neb. 135; *Hudson v. Solomon*, 19 Kan. 177.)

¹ 97 Am. Dec. 141.

Everts & Ewing, and H. H. Welsh, for Respondent.

The contestant was elected by the proper rejection of "No nomination" ballots improperly marked. The appellant who offered uncounted ballots cannot urge upon appeal that they were inadmissible. (*Laver v. Hoteling*, 115 Cal. 613.) The court did not err in its discretion in holding that all ballots were properly preserved. (*Tebbe v. Smith*, 108 Cal. 101.¹) All ballots containing the distinguishing mark were properly rejected. (*Maddux v. Walthall*, 141 Cal. 412; *Farnham v. Boland*, 134 Cal. 151; *Salcido v. Roberts*, 136 Cal. 670; *Patterson v. Hanley*, 136 Cal. 265; *People v. Campbell*, 138 Cal. 11.)

HENSHAW, J.—This is an election contest over the office of county recorder of the county of Fresno. The official canvass of the board of supervisors showed that the contestee had received a plurality of twenty-four votes over the contestant, and he was declared elected. Contestant instituted this contest, and as a result of the recount was found and declared by the court to have received a plurality of forty-one votes over the contestee. The contestee appeals.

Contestant's petition was properly verified. (*Kirk v. Rhoads*, 46 Cal. 403.)

The contestee made a preliminary objection to the introduction of any and all of the ballots offered, upon the ground that they had not been safely preserved in accordance with the law, and that their integrity was not assured. The court overruled the objection. The same question was presented as to certain of these ballots in the contest of *Davis v. Grunig*, 143 Cal. 336, and it was there said by this court in Bank that after a careful examination of the evidence we discovered nothing which would warrant us in holding that the court erred, and the language of this court in *Hannah v. Green*, 143 Cal. 19, was quoted to the following effect: "The question whether ballots have been sufficiently taken care of so as to preclude any reasonable suspicion that they were not in their original condition is a question which is largely within the judgment and discretion of the trial court, and its determination of that question should not be disturbed here if the evidence fairly warrants the conclusion which the court reached on the subject."

The ballots containing a stamp or cross in the blank opposite "No nomination" were properly rejected, as has been repeatedly held by this court. (*Maddux v. Walthall*, 141 Cal. 412.)

The contestant having charged irregularity and misconduct upon the part of the election officers in most, if not all, of the precincts, presented the ballots to the court from certain precincts and they were counted, the contestee making his objection to the introduction in evidence of any and all of the ballots upon the ground of their lack of proper preservation. The count proceeded under these circumstances until the point was reached where the judicial count of the precincts whose ballots were offered, taken with the supervisors' official count of the remaining precincts, gave contestant a plurality. Contestant then withdrew his charges of misfeasance and misconduct as to the uncounted precincts and rested his contest. Contestee then felt obliged to offer the ballots from the remaining uncounted precincts, in the hope by this means to swell his vote. He thus put himself in the position of offering evidence in the form of ballots the integrity and admissibility of which he had been stoutly objecting to. He here complains somewhat bitterly of the course pursued by contestant. but we do not perceive that contestant was not strictly within his legal rights in waiving and withdrawing his objections to any of the uncounted precincts. And, upon the other hand, contestee, as to the ballots which he himself offered, and by offering affirmatively declared to the court to be worthy of credence, cannot here be heard to say that they were inadmissible. But this question is rather of academic than of vital interest in this case, since we have held that the ballots were admissible, and since so holding we have been compelled to count the thousand or more contested ballots which have been presented to us for consideration. It is unnecessary to enter into a detailed discussion of the count which we have thus made. It is sufficient to say that the result has been to increase McCardle's plurality over Barstow to more than a hundred.

The judgment appealed from is therefore affirmed.

Van Dyke, J., Shaw, J., McFarland, J., Lorigan, J., and Angellotti, J., concurred.

Rehearing denied.

[Crim. No. 1162. In Bank.—October 15, 1904.]

THE PEOPLE, Respondent, v. W. H. WELLS, Appellant.

CRIMINAL LAW—ASSAULT WITH DEADLY WEAPON—INTENT TO ASSAULT THIRD PERSON.—Where the accused made an assault with a deadly weapon, consisting of a loaded pistol, upon the prosecuting witness, under a mistake as to the person, and with intent to assault another person with the same weapon, the intent is transferred from such other person to the person so assaulted, and the accused was properly convicted of an assault with a deadly weapon upon him.

ID.—PRESUMPTION OF UNLAWFUL INTENT—SUPPORT OF VERDICT—JURISDICTION UPON APPEAL.—The pointing of a loaded pistol at the prosecuting witness, under the circumstances shown, was such an act as would raise a presumption that it was done with an unlawful intent; and there being evidence to support the verdict that the weapon was pointed at the prosecuting witness with a guilty intent, this court will not disturb the verdict. The jurisdiction of this court in criminal cases is limited to questions of law alone.

ID.—EVIDENCE—DISCHARGE OF PISTOL AFTER ASSAULT.—Evidence was admissible to show that the defendant discharged the pistol after the termination of the assault therewith for the purpose of showing that it was loaded.

ID.—POSSESSION OF BRASS KNUCKLES—HARMLESS ERROR.—It was error to permit the arresting officer to testify that he found brass knuckles, besides the pistol, upon the person of the defendant; but the irregularity is not of sufficient importance to justify a reversal.

ID.—TESTIMONY OF DEFENDANT—INSTRUCTION—CAUTION TO JURY.—Where an instruction of the court cautioning the jury as to the testimony of the defendant was in effect the same as the instruction approved in the case of *People v. Cronin*, 34 Cal. 204, the judgment will not be reversed on account of it.

ID.—ERRONEOUS INSTRUCTION AS TO PROOF OF INSANITY.—Insanity is required to be established only by a mere preponderance of evidence; and it was erroneous for the court to instruct the jury that it must be "clearly established by satisfactory proof."

APPEAL from a judgment of the Superior Court of Madera County and from an order denying a new trial. M. L. Short, Judge presiding.

The facts are stated in the opinion of the court.

R. E. Rhodes, Leonard B. Fowler, and George W. Mordecai, Jr., for Appellant.

U. S. Webb, Attorney-General. and J. C. Daly, Deputy Attorney-General, for Respondent.

VAN DYKE, J.—The defendant was charged with assault with a deadly weapon with intent to murder, was tried, convicted of assault with a deadly weapon, and sentenced to imprisonment in the county jail for one year. An appeal is taken from the judgment and from the order denying defendant's motion for a new trial.

The first point made on behalf of the appellant is, that the evidence is insufficient to justify the verdict. The alleged assault was made on one McCartney near the town of Madera, in Madera County, at or near the house of Mrs. Northfield, where the said McCartney was boarding, and McCartney in giving his testimony says: "I was standing at the northwest corner of the porch, and we were talking, and all of a sudden Mr. Wells appeared at the front gate; don't know where he came from. He passed through the gate but never said a word and he came right around and walked right in front of me; he laid his left hand on my right shoulder and at the same time he pulled a gun out of his pocket and throws it right up in my face; just within six or eight inches of my face and he says: 'I want my money.' He says: 'I have lost thirty-five dollars,' as well as I could understand him, and as he did, I reached with my left hand and jerked his gun down by his side. I said: 'I ain't got your money—I don't know anything about it.' The pistol was not more than six or eight inches from my face; it was pointed directly at my face. He says: 'Excuse me, I have got the wrong man.' Miss Northfield where she was milking when she seen the gun fly, she jumped up and run around the back way of the house and he quit me and started in the direction that she went, and he turned when he got a little from me—probably a couple of steps, and he says: 'Keep your hands down.' I says: 'I ain't got nothing but my jack-knife.' When he says: 'Keep your hands down' I says 'Here is Hutson now.' I says: 'Maybe he knows something about your money.' Hutson was just driving up to the gate." It appears also that he then proceeded to make an assault with his pistol upon Hutson. It is contended on behalf of the appellant that the mere act of pointing the weapon at McCartney did not of itself amount to

the offense of an assault. The code defines an assault as follows: "An assault is an unlawful attempt, coupled with the present ability, to commit a violent injury on the person of another." (Pen. Code, sec. 240.) This is substantially the old or common-law definition of an assault. The evidence in this case showed that the pistol, or, as the witness calls it, a gun, was loaded, and, as McCartney testified, was pointed directly at his face, and within a short distance of it when he jerked it down. But it is contended also by appellant that the evidence shows that he had made a mistake in assaulting McCartney instead of Hutson, and therefore there was no intention on his part to make an assault upon McCartney. But where one intends to assault or kill a certain person, and by mistake or inadvertence assaults or kills another in his stead, it is nevertheless a crime, and the intent is transferred from the party who was intended to the other. In *People v. Sueser*, 142 Cal. 365, 367, this question was fully considered and a number of cases cited in support of this rule. The pointing of a loaded pistol under the circumstances here shown was such an act as would raise a presumption that the unlawful act was done with an unlawful intent. (Code Civ. Proc., sec. 1962; Pen. Code, sec. 21.) There being evidence to support the jury's finding that the weapon was pointed with guilty intent, this court will not disturb such finding, for in such case no question of law is presented and the jurisdiction of this court in criminal cases is limited to questions of law alone. (*People v. Fitzgerald*, 138 Cal. 40; *People v. Gonzales*, 143 Cal. 605; *People v. Donnolly*, 143 Cal. 394; *People v. Smith*, 143 Cal. 597.)

It is further contended that it was prejudicial error on the part of the court to permit the witness McCartney to be interrogated with reference to the discharge of the pistol by the defendant after the alleged commission of the assault upon him. But it was material to ascertain whether the pistol was loaded, and it was proper to admit evidence tending to show that fact, for unless it had been loaded it would not have been an assault. (*People v. Sylva*, 143 Cal. 62; *People v. Lee Kong*, 95 Cal. 666.¹) Similar objection is made by appellant to the admission of the testimony of Mrs. Northfield as to the discharge of the pistol after the alleged assault upon Mc-

¹ 29 Am. St. Rep. 165.

Cartney. But this evidence was also admitted for the purpose of showing that when this alleged assault was made on McCartney the pistol was loaded, and, for the reasons already stated, it was material for that purpose, and a part of the *res gestae*.

It appears that the arresting officer immediately after the commission of the offense charged, found upon the person of the defendant the revolver in question, and also brass knuckles, and it is contended upon the part of the appellant that the court erred in allowing the officer to give testimony with reference thereto. Though we do not deem this irregularity of such importance as to justify a reversal, still it would have been much better as well as safer in practice not to have allowed the officer to be examined in reference to the brass knuckles or any other articles found upon the defendant at the time of his arrest excepting the pistol in question.

The defendant testified as a witness in his own behalf, and on the subject of his testimony the court gave three instructions, which should perhaps be considered together as a single instruction. They are as follows:—

“22. The defendant has been examined as a witness in his own behalf; this it is his right to be, and the jury will consider his testimony as they would that of any other witness examined before you.

“23. It is proper for the jury, however, to bear in mind the situation of the defendant, the manner in which he may be affected by the verdict, and the very grave interest he must feel in it; and it is proper for the jury to consider whether this position and interest may not affect his credibility or color his testimony.

“24. But it is your duty to consider it fairly and give it such credit and weight as you think it is entitled to receive.”

Appellant's counsel objects to the above instruction No. 23 on the ground that it is unfair to the defendant and that it invades the province of the jury. He admits that it is substantially the same as the one approved in *People v. Cronin*, 34 Cal. 204, but he thinks that case is not good law and should be modified. In the recent case of *People v. Tibbs*, 143 Cal. 100, however, this court said of a similar instruction: “This instruction was in effect the same as an instruction given in the case of *People v. Cronin*, . . . and there held to be correct.

It has since been frequently held that where this instruction, though it may be regarded as erroneous, is kept well within the language considered in the Cronin case, the judgment will not be reversed on account of it. (*People v. Van Ewan*, 111 Cal. 144.) . . . It only undertakes to lay down for the guidance of the jury a matter that they would be apt to know about and act upon without any such instruction."

One of the defenses was insanity, caused by excessive intoxication, and the court gave the following instruction (No. 9) bearing upon such defense: "As has been said, in criminal cases the guilt of the accused must always be established to a moral certainty and beyond a reasonable doubt, and while the burden of proof is upon the defendant to establish the fact of his insanity at the time of the commission of the alleged act, when that plea is interposed, yet he does not have to make proof of it to a moral certainty and beyond a reasonable doubt, but only to your entire and perfect satisfaction." We do not agree with the criticism of the defendant that the language used in this instruction is equivalent to saying that the defense should be established beyond all reasonable doubt, but the last clause of the instruction should have been omitted. Another instruction (No. 26), also bearing on this subject, reads as follows: "Where insanity is relied upon as a defense, the burden of proof is on the defendant. The proof must be such in amount that if the single issue of the insanity or sanity of the defendant should be submitted to the jury in a civil case, it must find that he was insane. In other words, insanity must be *clearly established by satisfactory proof*." This last instruction is almost in the exact language of the one condemned in *People v. Wreden*, 59 Cal. 393. The instruction there was as follows: "I charge you that where insanity is relied upon as a defense, the burden of proof is on the defendant, and the proof must be such in amount that if the single issue of sanity or insanity of the defendant should be submitted to the jury in a civil case, they would find that he was insane, or, in other words, that *insanity must be clearly established by satisfactory proof*; it is not sufficient that you should entertain a reasonable doubt as to his sanity, but the proof must be satisfactory and the fact of insanity *clearly established*." This court, in commenting upon that instruction, after stating the rule that such a defense was required to be

established by a mere preponderance of evidence, says: "Is not the expression '*clearly* established by satisfactory proof' the full equivalent of 'established by satisfactory proof beyond a reasonable doubt'? How can a fact be said to be clearly established so long as there is a reasonable doubt whether it has been established at all? There can be no 'reasonable doubt' of a fact after it has been clearly established by satisfactory proof." After citing the definitions in Webster with reference to *clearly* and in a *clear manner*, and also the charge of Chief Justice Shaw in *Commonwealth v. Webster*, 5 Cush. 320,¹ bearing upon this point, this court concludes, "Under the instruction given it was the duty of the jury to require that the defense of insanity should at least be proven beyond a reasonable doubt. This was error." And the court reversed the case for that reason. We have not been referred to a case, nor do we know of one in this court, overruling or modifying the decision in *People v. Wreden*, 59 Cal. 393. On the contrary, in *People v. Allender*, 117 Cal. 81, the court instructed the jury that the burden rested upon the defendant of proving his insanity by a preponderance of evidence merely. "The principle of law thus declared is in full accord with the law of this state. For a period of thirty years this court has repeatedly and uniformly so declared the law to be. The cases to that effect are numbered by the score"—referring to a large number of cases.

For the error in giving the instruction in question on the plea of insanity the judgment and order must be reversed and the cause remanded, and it is so ordered.

Shaw, J., Angellotti, J., McFarland, J., Lorigan, J., and Henshaw, J., concurred.

¹ 52 Am. Dec. 711.

[S. F. No. 3980. In Bank.—October 18, 1904.]

LUCILE D. GAY, Petitioner, v. E. S. TORRANCE, Judge of the Superior Court of San Diego County, Respondent.

NEW TRIAL—IRREGULARITY IN PROCEEDINGS OF COURT—MISCONDUCT OF JUDGE—AFFIDAVITS.—Personal misconduct on the part of the judge having under advisement a case tried in his court of such a nature that the substantial rights of the party against whom the case is decided have been materially affected thereby, constitutes an "irregularity in the proceedings of the court," for which a new trial may be granted, under subdivision 1 of section 657 of the Code of Civil Procedure, if established by competent affidavits.

ID.—RIGHTS OF MOVING PARTY AS TO AFFIDAVITS—REPLY TO COUNTER-AFFIDAVITS—CONSIDERATION BY COURT.—The party moving for a new trial on the ground of "irregularity in the proceedings of the court which prevented a fair trial," is entitled to file and serve not only competent original affidavits tending to establish the same, but also reply affidavits to new matter in counter-affidavits, and is of course entitled to have all competent affidavits considered by the court upon the hearing of the motion.

ID.—IMPROPER ORDER STRIKING OUT AFFIDAVITS—APPEAL—BILL OF EXCEPTIONS—ACTION OF COURT.—The trial court is not justified in striking out any competent affidavits filed and served upon the motor. An order purporting to do so after final judgment is appealable; and the appellant is entitled to a bill of exceptions embodying any competent counter-affidavits stricken out.

ID.—MANDAMUS—SETTLEMENT OF EXCEPTIONS—DISCRETION.—The granting of the writ of *mandamus* is not a matter of right, but a matter largely within the discretion of the court. The writ will not issue where it would be of no benefit to the applicant, or if he does not establish his right to the relief sought. But the discretion of the court to grant or refuse the writ is not arbitrary, but is to be exercised in accordance with the established rules of law, in order to prevent a failure of justice. It would be an abuse of discretion to refuse the writ to one who has a substantial right to protect or enforce which may be accomplished thereby, and for which there is no other plain, speedy, or adequate remedy in the ordinary course of law.

ID.—AFFIDAVIT UPON INFORMATION AND BELIEF PROPERLY STRICKEN OUT—DEMAND TOO BROAD—REFUSAL OF MANDATE.—An affidavit filed by an attorney for the moving party, assailing the judge for misconduct solely upon information and belief, is unavailing for any purpose, and it was properly stricken out as scandalous. Where the demand which was the basis of the petition for the writ of mandate was, that such affidavit be included with others in the bill of exceptions, it was too broad; and the alternative writ of man-

date, having been awarded for a purpose partly proper and partly improper, will be discharged, and a peremptory writ will be refused on that ground.

PETITION for Writ of Mandate to a Judge of the Superior Court of San Diego County. E. S. Torrance, Judge.

The facts are stated in the opinion of the court.

Victor E. Shaw, and Valentine & Newby, for Petitioner.

Oscar A. Tippet, L. L. Boone, and W. C. Van Fleet, for Respondent.

ANGELLOTTI, J.—The petitioner, Lucile D. Gay, is the plaintiff in an action for divorce pending in the superior court of the county of San Diego. The defendant therein, John H. Gay, having filed an answer and cross-complaint, the action was tried, and an interlocutory judgment was rendered, declaring that the defendant, John H. Gay, was entitled to a divorce on his cross-complaint. Subsequently, petitioner served and filed her notice of intention to move for a new trial upon various grounds, including "irregularities in the proceedings of the court which prevented plaintiff from having a fair trial." The notice stated that the motion would be made upon affidavits and upon a bill of exceptions.

Subsequently, petitioner served her proposed bill of exceptions and affidavits, and filed the affidavits with the clerk of the court. Among the affidavits so served and filed, were two devoted to the attempt to show irregularities in the proceedings of the court—viz., those of Willia Hosmon and Nathan Newby. The defendant in the action in due time served and filed counter-affidavits upon the question as to irregularities of the court, and subsequently petitioner served and left with the clerk for filing certain reply affidavits.

Subsequently, the trial court, upon the motion of defendant in said action, upon the grounds, among others, that one of the affidavits was made solely on information and belief, and that the matters contained in all said affidavits were useless, immaterial, impertinent, and scandalous, consisting of offensive personalities and scandalous charges against the judge who tried the cause, made an order striking from the files the affidavits of Nathan Newby and Willia Hosmon and

the reply affidavits of Sallie Jones and Willia Hosmon. On motion of defendant, a further order was made striking from the files the counter-affidavits upon the ground that it would be improper to permit the same to remain on file after the affidavits to which they relate had been stricken out.

The petitioner proposed a bill of exceptions to be used on appeals from the orders striking out the affidavits, and amendments were proposed thereto, and thereafter an engrossed bill was presented to respondent for authentication, whereupon respondent refused to allow or to certify said bill of exceptions. Subsequently petitioner perfected her appeal to this court from the orders striking out the affidavits.

The foregoing facts appear from the petition, which, for the purposes of the demurrer thereto, must be taken as true.

Petitioner asks for a writ of mandate, commanding respondent to forthwith settle and certify the bill of exceptions *containing the affidavits stricken out*, to be used upon the appeals from the orders striking out said affidavits, and for a writ of prohibition restraining respondent from hearing her motion for a new trial pending the hearing in this court of such appeals. An alternative writ was issued requiring respondent to settle and certify said bill of exceptions containing said affidavits or show cause why he had not so done.

The sufficiency of the petition to justify the relief sought is challenged by a motion to strike out the petition and by a demurrer.

The alleged irregularities in the proceedings of the court to which the affidavits in question referred were alleged acts and conduct of the judge between the time of the submission of the case for decision, on October 7, 1903, and the time of the rendition of the decision, October 29, 1903, constituting, it is claimed, misconduct of such a nature and to such an extent as to render the granting of a new trial necessary or proper, under subdivision 1 of section 657 of the Code of Civil Procedure. That section provides that a new trial may be granted "for any of the following causes, materially affecting the substantial rights of such party: 1. Irregularity in the proceedings of the court, jury, or adverse party. . . ." So far as a motion for a new trial is based upon such a ground, it must be made upon affidavits (Code Civ. Proc., sec. 658), and the moving party is of course entitled to have such compe-

tent affidavits as are material to the motion and are seasonably served and filed considered upon the hearing of the motion for a new trial. A trial court would not be justified in striking any such affidavits from the files of the court, and an order purporting to so do, being a special order made after final judgment, would be appealable under subdivision 3 of section 939 of the Code of Civil Procedure. (*Gay v. Torrance*, 143 Cal. 14.) Upon an appeal from such an order, the aggrieved party is entitled to a bill of exceptions presenting the proceedings and rulings of the lower court in such shape that the action of such court may be reviewed by the appellate tribunal. Ordinarily, upon such an appeal the affidavits stricken out would necessarily constitute the most material part of such a bill of exceptions. So far as the strict letter of the law is concerned, there can be no doubt that the petitioner is entitled, upon her appeal from the orders striking out certain affidavits, to a bill of exceptions containing such affidavits.

It is true, as contended by learned counsel for respondent, that the granting of the writ of *mandamus* is not a matter of right, but is a matter largely within the discretion of the court. By this, however, it is not meant that the court may arbitrarily grant or refuse the writ. The discretion is to be exercised in accordance with the established rules of law, *in order to prevent a failure of justice*.

As a court will not do a vain or fruitless thing, or, as was said by Chancellor Kent in *Trustees etc. v. Nicoll*, 3 John. 598, "A court will not undertake to exercise power but when they exercise it to some purpose" (see *Boyne v. Ryan*, 100 Cal. 265, 267), it is laid down as a rule of law that the writ of mandate will not issue where it would be of no benefit to the applicant (Merrill on *Mandamus*, sec. 75; High on *Extraordinary Legal Remedies*, secs. 9, 10), that a mere abstract right, unattended by any substantial benefit to the relator, will not be enforced by *mandamus* (19 Am. & Eng. Ency. of Law, 2d ed., p. 758), and that where the relator has no right to the relief which it is his ultimate object to obtain, the writ should not be issued. (19 Am. & Eng. Ency. of Law, 2d ed., p. 754.) This rule has been applied by this court on several occasions. (See *People v. Kahl*, 18 Cal. 432; *People v. Dickson*, 46 Cal. 53; *Clark v. Crane*, 57 Cal. 629.)

But where one has a substantial right to protect or enforce, and this may be accomplished by such a writ, and there is no other plain, speedy, and adequate remedy in the ordinary course of law, he is entitled as a matter of right to the writ, or, in other words, it would be an abuse of discretion to refuse it.

A party aggrieved is entitled to move for a new trial upon the ground of irregularity in the proceedings of the court materially affecting his substantial rights; he is entitled to present and file affidavits in support of such ground; he is entitled to have such affidavits, so far as they may be competent and material, considered upon the hearing of the motion *by the trial court*, and he is entitled to the judgment of *such trial court* as to the truth of the material allegations contained in the affidavits and the effect thereof upon his rights. His right to have his affidavits, so far as they are competent and material, considered by the trial court, and his right to have the judgment of the trial court upon all material questions of fact concerning which there is any conflict in the affidavits, cannot be said to be mere abstract rights, unattended by any substantial benefit. They are rights guaranteed by the law to every party prosecuting a motion for a new trial, and no court can say in advance of the action of the trial court on such motion that the ultimate decision thereon will not be in favor of the moving party. So far, therefore, as the affidavits presented by petitioner on the motion for a new trial were competent and material upon the question as to whether a new trial should be granted for irregularities in the proceedings of the court, it could not properly be said in response to an application for a writ of mandate having for its ultimate object the consideration by the trial court of such affidavits upon the motion for a new trial, that the writ could be refused upon the ground that the granting of such a writ is a matter largely within the discretion of the court to which the application is made.

We are not prepared to assent to the contention of learned counsel for respondent to the effect that personal misconduct on the part of the judge of a court having under advisement a case tried in his court cannot be an "irregularity in the proceedings of the court" for which a new trial may be granted under subdivision 1 of section 657 of the Code of

Civil Procedure. It must be acknowledged that the misconduct of a judge under such circumstances may be of such a nature as to make it apparent that the substantial rights of a party have been materially affected thereby,—as, for instance, where it is made to appear that he has received a bribe from one of the parties to the cause, or has so conducted himself with reference to a party to the cause as to show that he cannot well act toward such party without favoritism, or has so impaired his mental powers by the use of intoxicants that while engaged in the actual disposition of the cause he was incapable of properly exercising his judgment thereon. As has been said, it would shock the judicial instinct and be a reproach to our system if a decision rendered under such circumstances could not for that reason be set aside, and yet, if the contention of respondent in this behalf be well founded, there would be no substantial remedy for the aggrieved party. There is no other ground for a new trial which could by the utmost liberality of construction be held to cover such a case. But we are of the opinion that it would be an exceedingly narrow and technical construction that would exclude such a case from the operation of subdivision 1 of section 657 of the Code of Civil Procedure. It was said by Mr. Hayne in his work on New Trial and Appeal that it is impossible to answer with precision the question "What is an irregularity of the court?" except that by that term is meant some conduct of the court other than orders and rulings, and that no accurate classification of things which are irregular is possible. Mr. Spelling, in his recent work on New Trial and Appeal, regards any overt act of the trial court violative of the right of a party to a fair and impartial trial, amounting to misconduct, as an irregularity, and says: "Courts of review treat misconduct of trial courts as irregularity." (Sec. 32.) In *Woods v. Jensen*, 130 Cal. 200, 205, it was said by this court that this ground for a new trial is intended to refer to matters which appellant cannot fully present by exceptions taken during the progress of the trial, and which must therefore appear by affidavits. The language of the statute is sufficiently broad to include any departure by the court from the due and orderly method of disposition of an action by which the substantial rights of a party have been materially affected, where such departure is not evidenced by a ruling or order

that may be made the subject of an exception. It may of course be freely conceded that the "personal habits, conduct, deportment, or statements of the judge," having no relation to or effect on the disposition of the cause, are not the proper subject of complaint upon a motion for a new trial. The question always is as to whether the acts were of such a nature, and done under such circumstances, as to afford reasonable grounds for the conclusion that by reason thereof the defeated party has not had a fair and impartial trial. Where they are of this kind, we are satisfied that they afford the basis for a motion for new trial under subdivision 1 of section 657 of the Code of Civil Procedure. The opinion of the supreme court of Montana in the case of *Finlen v. Heinze*, 28 Mont. 548, 571, is instructive upon this subject, and is in full accord with our views. Most of the cases cited by counsel for respondent upon the definition of an irregularity are cases in which the term "irregularity" was used in contradistinction to jurisdictional defects.

It would serve no useful purpose to here enter into an analysis of the affidavit made by Willia Hosmon, presented on behalf of petitioner. It is sufficient to say that, after a careful consideration thereof, we are not prepared to say that if the trial court, after a full consideration thereof, and of the counter-affidavits presented in reply thereto and the subsequent reply affidavits presented on behalf of petitioner, should grant a new trial on the ground of irregularities in the proceedings of the court, we should feel warranted in disturbing the order. (In saying this we do not wish to be understood as intimating that the trial court should grant a new trial on this ground upon the showing made.) We cannot, however, upon this application determine any conflict in the evidence upon the question of irregularities in the proceedings of the court. That is a matter upon which petitioner is entitled to a determination by the trial court.

As to the affidavit of Mr. Newby, one of petitioner's attorneys, presented in support of the motion, a different question is presented. So far as it can possibly be claimed to be material, it was entirely made on "information and belief," nothing material to the question of irregularities being therein stated as a fact within the knowledge of the deponent. Unless this affidavit constituted competent evidence upon the

question of irregularities, it was purely scandalous matter assailing the judge of the court, and serving no useful purpose, and it was not only the right but the duty of the court to strike the same from its records. If, therefore, it is clear to us upon this proceeding, that the affidavit cannot be considered upon the motion for a new trial, and consequently that petitioner cannot ultimately have any substantial benefit therefrom, we undoubtedly would be justified in refusing to compel the respondent to make such purely scandalous and immaterial matter a permanent record of his court, by incorporating the same in a bill of exceptions.

Such a situation would not only present a case for the application of the rule already alluded to as to the discretion of the court in the matter of an application for a writ of mandate, but would imperatively require the application of such rule; for it certainly is not consistent with the efficient administration of the law by the courts that scandalous charges against a judge of a court, not materially affecting an issue before such court, should be allowed to be made a permanent record thereof. Such a practice should be tolerated, as was said in effect in *People v. Albany etc. R. R. Co.*, 39 How. Prac. 60, only where absolutely necessary for the proper protection of a party to a cause.

If it should be assumed that the matters set forth on information and belief in the affidavit of Mr. Newby constituted irregularities in the proceedings of the court which would warrant the granting of a new trial by the trial court (which we do not concede), we are satisfied that such affidavit cannot be considered competent evidence as to these matters.

Ordinarily, an affidavit made solely on information and belief is unavailing for any purpose. The statute allows such affidavits for certain prescribed purposes,—as, for instance, in the verification of pleadings,—but there is no statutory provision authorizing such an affidavit in a case like the one at bar. The subject-matter of certain applications—as, for instance, an application for a continuance upon the ground of the absence of witnesses—is of such a nature that, from the necessities of the case, the showing as to what the absent witness will testify to must ordinarily be made by the moving party upon information and belief, and the statute upon the subject so recognizes. (Code Civ. Proc., sec. 595.) But

where one is testifying as to something that has transpired he can ordinarily testify only as to those facts which he knows of his own knowledge (Code Civ. Proc., sec. 1845), and it is immaterial in this connection whether his testimony is taken by affidavit, deposition, or oral examination.

Where a statute provides that the evidence upon a certain question must be presented by affidavit it simply means that the competent and material testimony must be presented by the affidavits of the witnesses. If the statute authorized the taking of the testimony on a motion for new trial by oral examination, we apprehend that it would not be contended that Mr. Newby could have given purely hearsay testimony. Information and belief affidavits in cases where misconduct of the jury has been urged as ground for a new trial have been held by this court to be insufficient. In *People v. Findley*, 132 Cal. 301, 303, it was said: "It is equally clear that defendant's affidavit as to the misconduct of the jury, based as it is solely on information and belief, is entitled to no weight. There was no competent or proper evidence of misconduct of the jury laid before the court." (See, also, *People v. Tarm Poi*, 86 Cal. 225, 231; *People v. Williams*, 24 Cal. 31, 40.)

We cannot see that the reasons stated in the affidavit for the making of the same on information and belief—viz., that the persons who knew the facts had refused to make affidavit—can alter the situation. It still remains that there is "no competent or proper evidence" contained therein, and if petitioner is unable to procure competent evidence as to the alleged irregularities she cannot establish the same. It follows that this court will not require the respondent to make such affidavit a permanent record of his court.

So far as the counter-affidavits are applicable to the issues raised by the affidavit of Willia Hosmon, they are undoubtedly competent and material evidence to which both parties are entitled on the motion for new trial, and we are satisfied that a party moving for a new trial upon affidavits is entitled to present reply affidavits as to new matters set up in the counter-affidavits.

The petitioner not being entitled to a bill of exceptions containing the affidavit of Mr. Newby, she must necessarily fail upon this application.

The demand made upon respondent by petitioner was, that he should allow and certify a certain proposed bill of exceptions containing all of the affidavits stricken out. The application to this court is for a writ requiring respondent to forthwith settle and certify "the bill of exceptions containing said affidavits," and the alternative writ required him to "settle and certify said bill of exceptions containing said affidavits," or show cause why he has not so done. It is well settled that a petitioner for a writ of mandate is concluded by the terms of the alternative writ, and that where the alternative writ is awarded for a purpose partly proper and partly improper, the court will not enforce it by a peremptory *mandamus* as to that which is proper, but will give judgment for the respondent. It is incumbent upon the petitioner in such a proceeding to establish his right to the performance of the very act or acts commanded by the alternative writ, and unless he so does he must fail entirely. (High on Extraordinary Legal Remedies, secs. 539, 548.)

Petitioner is entitled to a bill of exceptions to be used upon her appeal from the orders striking out the affidavits, containing such affidavits as may be competent and material upon the question as to whether a new trial should be granted on the ground of irregularities in the proceedings of the court.

We have herein given our views as to what affidavits should receive the consideration of the trial court upon the motion for a new trial. Such affidavits should, of course, remain on the files of the court, and an order striking them from the files would necessarily, upon an appeal duly taken and regularly prosecuted, be reversed. The restoration of such affidavits to the files of the court would make unnecessary the further prosecution of the appeals taken by the petitioner. If such restoration be not so made, doubtless the trial court will, upon demand, settle and certify a bill of exceptions containing such material and competent affidavits as may be necessary for the proper disposition of such appeals. Those suggestions herein made which are not necessary to a disposition of the present application for a writ of mandate, are made with a view to facilitate the disposition of the motion for a new trial in the court below, and to obviate the necessity of applications and appeals to this court having for their

object the making of a proper record for the consideration of the trial court upon the motion for a new trial.

The alternative writ of mandate heretofore issued is discharged and the application for a peremptory writ of mandate is denied.

Shaw, J., Van Dyke, J., Henshaw, J., Lorigan, J., Beatty, C. J., concurred.

McFARLAND, J., concurring.—I concur in the judgment and in what is said in the opinion of Mr. Justice Angellotti, to the point that a court will not grant a writ of mandate where it would be doing a vain thing of no benefit to the applicant, and also in what is said about the affidavit of Newby. But, in my opinion, there is nothing in the affidavits of Willia Hosmon and other affidavits filed by petitioner that by any proper construction can be considered as constituting or tending in any way to show, an “irregularity in the *proceedings of the court*,” within the meaning of subdivision 1 of section 657 of the Code of Civil Procedure.

[L. A. No. 1691. In Bank.—October 19, 1904.]

A. J. GAYLORD, Petitioner, v. CHARLES F. CURRY,
Secretary of State, Respondent.

ELECTIONS—OFFICIAL BALLOT—CONGRESSIONAL DISTRICT—PERCENTAGE OF VOTE OF STATE.—In a congressional district where the provisions of the Primary Election Law are not mandatory, a political party which has cast three per cent of the entire vote of the state at the last election is entitled to nominate a member of the house of representatives in Congress for such district, and to have such nomination placed upon the official ballot by the secretary of state, notwithstanding three per cent of the vote of such party was not cast within such district.

PETITION for Writ of Mandate to the Secretary of State.

The facts are stated in the opinion of the court.

Cameron H. King, Emil Liess, and James Taylor Rogers,
for Petitioner.

U. S. Webb, Attorney-General, and E. B. Power, Deputy Attorney-General, for Respondent.

THE COURT.—This is an application by petitioner for a peremptory writ of mandate directed against the secretary of state, to compel that officer to certify petitioner's name as a candidate of the Socialist party for member of the house of representatives in Congress of the United States for the first congressional district of California to each county clerk within the said first congressional district. It is made to appear that the Socialist party of California cast three per cent of the votes at the next preceding state election, but did not cast three per cent of the votes in the congressional district above mentioned. It is further made to appear that in no portion of this congressional district are the provisions of sections 1357 to 1375 of the Political Code relative to mandatory primary elections in force or effect. Under this state of facts the secretary of state justifies his refusal under the provisions of section 1361 of the Political Code to the following effect: "All political parties which, at the last election prior to any ensuing primary election herein provided for, polled at least three per cent of the entire vote of the state, county, district, city and county, city or town, or other political division for which a primary election is to be held under the provisions of this chapter, or which, in the case of any county, city and county, township, city or district wherein no general election shall have been held after its organization, shall have polled at least three per cent of the votes cast in the precincts composing such county, city and county, township, city or district, shall be entitled to a designation and place upon the official ballot to be used in all elections for delegates under this chapter, upon complying with the provisions of this section."

Under this it is contended that as the Socialist party failed to cast three per cent of the votes in this particular district it is not entitled to designation and place upon the congressional ballot.

The supreme court of the state of Illinois was called upon to construe a section of the revised statutes of that state similar in language and identical in effect to our own, and it held that if a political party had cast the requisite number

of votes in a general state election it was entitled by virtue of that fact to have its nominees for local and district officers placed upon the ballot, even if it had not cast the requisite percentage of votes in the particular county or district for which the nomination was made. (*People v. Williamson*, 185 Ill. 106.) The conclusion that such is the correct interpretation of the statute is, so far as our law is concerned, strengthened by the language of section 1186 of the Political Code, where it is provided: "If such convention be assembled to present candidates for public office to be elected within territory or a political division in no portion of which said sections of this code are mandatory or in force and effect, then and in such event the political party which such organized assemblage of delegates represents, must have at the last election before the holding of such convention polled at least three per cent of the *entire vote of the state*, or of the county, city and county, district or other political division for which nominations are to be made." Here is an unmistakable declaration that in a congressional district such as this, where the provisions of the primary law are not mandatory, if a political party shall have cast three per cent of the entire vote of the state it shall be entitled to nominate officers from such district and to have their names placed upon the official ballot.

Let a peremptory writ of mandate issue commanding the respondent, Charles F. Curry, secretary of state of the state of California, to certify the name of petitioner, A. J. Gaylord, as a candidate of the Socialist party for member of the house of representatives in Congress of the United States for the first congressional district of California, to each county clerk within the said first congressional district, as required by the provisions of section 1193 of the Political Code of California.

[L. A. No. 1585. Department One.—October 24, 1904.]

**WILLIAM GARDINER, Appellant, v. ADELINE CORD
et al., Respondents.**

PARTITION—TERMINATION OF TRUST—MORTGAGE LIEN.—The right of a tenant in common to maintain an action for partition is not affected by the lien of a mortgage upon his share which may be discharged at any time by payment of the debt secured; nor is it affected by a prior trust in the land created by all of the tenants in common, which, if valid, has terminated by the cessation of the estate of the trustee therein.

13.—VALIDITY OF TERMINATED TRUST—RECONVEYANCE NOT ESSENTIAL.—

It is immaterial to the maintenance of the action for partition whether the terminated trust was valid or invalid in its creation; since if valid it has terminated, and the rights of the owners of the land can be adjudicated in equity, or in the action for partition, without the necessity of an action reconveyance thereof by the trustees.

14. —MORTGAGE BY TRUSTEES—CONTRAVENTION OF TRUST—AGREEMENT

BY COTENANTS FOR PROPORTIONATE LIABILITY.—Although a mortgage executed by the trustees as such in contravention of the terms of the trust was void in law, yet where it appears to have been executed by some of the cotenants to secure the debt which was satisfied by the new mortgage, an agreement for proportionate liability for the original debt as between the cotenants will be deemed to apply to the mortgage, and make it, as between themselves, a lien upon the share of each cotenant, to the extent of his proportion of liability for the debt secured.

APPEAL from a judgment of the Superior Court of Los Angeles County. Waldo M. York, Judge.

The facts are stated in the opinion.

Dunnigan & Dunnigan, for Appellant.

Camp & Lissner, for Adeline Cord, Respondent.

J. L. Murphey, for Mary B. Purcell, Respondent.

O. P. Widaman, Max Loewenthal, A. B. McCutchen, and Graves, O'Melveny & Shankland, for other Respondents.

HARRISON, C.—Action for the partition of a parcel of land in the city of Los Angeles known as the "Allen Block."

at the corner of Spring and Temple streets. The superior court rendered judgment against the plaintiff, and he has appealed therefrom upon the judgment-roll without any bill of exceptions.

May 23, 1889, William Gardiner (the plaintiff herein), Adeline Jonson (now Adeline Cord), Annie Allen, James Allen (defendants herein), Benjamin Allen, and Catherine Allen were the owners in fee as tenants in common of the said real property, each being the owner of an undivided sixth thereof, and on that day entered into and executed an agreement with each other wherein, as a means of facilitating the accomplishment of the purpose of said agreement, the said William Gardiner, Annie Allen, Catherine Allen, and Benjamin Allen, as the parties of the first part thereto, conveyed the said property to James Allen and Adeline Jonson, as the parties of the second part thereto, in trust for certain purposes therein declared and hereinafter mentioned. After reciting in the agreement their respective ownership of the property, they recite that they are severally and individually indebted in certain amounts, aggregating about twenty-four thousand dollars (giving the amount of the indebtedness of each and the names of the respective creditors), and that said indebtedness is secured by mortgage and other liens upon the above property, and that they had agreed to consolidate the said indebtedness in a single loan, and were about to execute a joint and several mortgage of said property to secure the same, irrespective of their proportionate individual indebtedness, and that for the purpose of liquidating said mortgage indebtedness they had leased the said property for a term expiring January 1, 1892, and had agreed that the monthly rent therein provided, or a portion thereof, should be applied each month in payment of said mortgage indebtedness, and that "inasmuch as it would greatly facilitate the management and control of the said property and the transaction of business in connection with the same, to vest the same in trust," they had mutually agreed to appoint the parties of the second part thereto as trustees for the uses and purposes thereafter declared. The agreement thereupon declares that for and in consideration of the premises the parties of the first part do grant the said real property unto the parties of the second part, to the survivor of them and their

successors, "upon trust to enter into and upon the same and take possession thereof. . . . And the said real property shall be managed and controlled by the said trustees until the full payment of the said mortgage so executed as aforesaid, and they are at all times to keep the same free from any and all encumbrances other than the mortgage hereinbefore referred to; and to at all times keep the premises fully insured. Thirty days before the expiration of the term of said lease they are to advertise said premises to let in two daily papers for four weeks and to let the same to the highest and best bidder for a term not to exceed the term of this trust. At the expiration of this trust the said trustees shall reconvey the said premises to the said parties of the first part in the proportion of one sixth each, and during the continuance of said trust they are to render them monthly accounts of the moneys received and disturbed by them."

In addition to this transfer of the real property the said parties of the first part authorized the parties of the second part to receive the moneys to be procured under the joint mortgage, whose execution had been agreed upon and to dispose of the same by paying the said specified indebtedness and liabilities of the several parties to the agreement. They also provided in said agreement for the liquidation of the said mortgage indebtedness by applying in payment thereon from time to time a portion of the rents that might accrue upon the aforesaid lease of the property; and for this purpose the parties of the first part assigned and set over said lease to the parties of the second part, and directed that they should collect the rents reserved in said lease as they should fall due from time to time, and out of the money so collected should pay the quarterly installments of interest upon said mortgage; and after paying in each month a portion thereof to the several parties to the agreement, should apply the balance then remaining in their hands toward the payment of the principal of said mortgage debt. The agreement also provided that as between the parties thereto the amounts paid in discharge of their respective liabilities and indebtedness should be severally charged to their respective accounts, and, to the extent of the payments made for the benefit or account of each within the limits specified in the instrument, should constitute a lien upon his share or interest in the afore-

said real property; and that the said accounts of the several parties should each be credited with an aliquot part of the rents paid in liquidation of the mortgage debt, until the credits so given to any of the several parties should have paid his proportionate liability for said mortgage debt, and that thereafter his share of the rents when collected should be paid directly to him.

By the same instrument the parties of the second part granted to the parties of the first part all their interest in the aforesaid real property as security for the faithful performance by them of the duties imposed upon them by virtue of said instrument, and agreed that after such performance they would reconvey to each of said first parties an equal undivided sixth of the fee of said premises.

Adeline Jonson, one of the parties to said agreement, subsequently married William S. Cord, and before the commencement of this action succeeded to the interest of Catherine Allen in said real estate. Subsequent to the execution of the agreement Griffin Johnston succeeded to the interest of Benjamin Allen in said real property, and died intestate in 1895, leaving as heirs at law his widow, the defendant Maud W. Johnston (who afterwards was appointed and qualified as the administratrix of his estate), and an infant daughter, the defendant Grace Margaret Johnston. In June, 1899, James Allen assumed to resign the duties and powers conferred upon him by virtue of said agreement, and since that date the defendant Adeline Cord has had possession and control of said real property.

Immediately upon the execution of the instrument the parties thereto executed their joint note to the German Savings and Loan Society for the sum of twenty-four thousand dollars, and a mortgage upon the aforesaid real property to secure its payment, and the said parties of the second part received the said twenty-four thousand dollars from the said mortgagee, and out of the same paid and discharged the indebtedness and obligations which they were authorized by the said agreement to pay, and entered into possession of said real property, and thereafter collected the rents thereof and made payments out of the same upon the said mortgage debt until May 17, 1898, at which time there remained due and unpaid thereon the sum of eight thousand dollars. At that

time also the proportionate shares of said mortgage indebtedness of Annie Allen and of Maud W. Johnston and Grace Margaret Johnston (who had succeeded to the interest of Benjamin Allen in said real property) had been fully paid, and as between the parties to the agreement of May, 1889, they were not indebted in any sum whatever to said mortgagee. On that day the plaintiff herein, together with Annie Allen, James Allen, Adeline Jonson, and Maud W. Johnston (defendants herein), and Catherine Stare (formerly Catherine Allen) borrowed from W. H. Purcell the sum of eight thousand dollars, and executed to him their promissory note therefor, and also a mortgage upon the aforesaid real property, as security for its payment. The said James Allen and Adeline Jonson also joined in the execution of the said mortgage "as trustees." The court finds that the mortgage was made under an agreement between them for the purpose of paying off the aforesaid mortgage debt and more effectually carrying out the provisions of the agreement of May 23, 1889. The moneys received upon the said note and mortgage were obtained for and were paid to the German Savings and Loan Society, the mortgagee in the former mortgage, on said seventeenth day of May, 1898, and the said mortgage debt was on said date fully released and satisfied of record. This mortgage to Purcell is still unsatisfied and outstanding. Prior to its execution the plaintiff herein executed to the defendant Annie Allen an instrument of indemnity by which he agreed to hold her harmless from any liability by virtue thereof, and agreed that as between them, in case of any foreclosure, his interest in the property should be applied in satisfaction of the mortgage prior to any sale of her interest therein. Other mortgages upon certain of the individual interests in said real property have since said date been executed by the owners thereof, and are still unsatisfied and outstanding.

In February, 1899, in an action brought by the plaintiff herein for that purpose, the superior court rendered a judgment settling the accounts of the defendant Adeline Cord and James Allen for their receipts and disbursements as trustees under the aforesaid agreement of May, 1889, from the time of its execution until September 1, 1898, and in December, 1900, in another action between said trustees, a judgment was rendered settling their accounts as between themselves

By the judgment of February, 1899, it was determined that of the mortgage indebtedness existing against said real property on September 1, 1898, there was due from the plaintiff herein the sum of \$5,920.08, and from the defendant Adeline Cord \$1,394.50, and from James Allen \$933.61; and by the judgment of December, 1900, it was determined that as between the said Adeline Cord and James Allen the amount due by the latter on account of the mortgage of May, 1898, was on the 21st of October, 1899, the sum of \$274.70. The defendant Adeline Cord has in her hands of said James Allen's share of the revenues of said property enough to pay his portion of said mortgage indebtedness, and also of her own share of said revenues enough to pay her portion of said indebtedness as determined by the aforesaid judgment. The plaintiff herein has not paid or offered to pay his share of the said mortgage indebtedness, and after applying thereon all moneys in the hands of said Adeline Cord applicable thereto, his share of said indebtedness exceeds forty-six hundred dollars.

The superior court held that the agreement of May, 1889, is a valid subsisting agreement, and that, inasmuch as the indebtedness for whose payment it was entered into has not been fully paid, and as the trustees therein named have not in their hands sufficient moneys with which to pay the same, the agreement has not been fully performed, and that for this reason the plaintiff is not entitled to have a partition of the property or a sale thereof for the purpose of a division of the interests of the several cotenants therein; that before he can have such relief he must first discharge his portion of the mortgage indebtedness thereon for which the said agreement was entered into.

It is not necessary for the disposition of the present appeal to determine whether a valid trust in the aforesaid real property was created by the instrument of May 23, 1889, as was held by the superior court, or whether, as contended on behalf of the appellant, the provisions therefor in the instrument were in contravention of provisions of the Civil Code, and therefore ineffective to create a trust in said property, as, in our opinion, the rights of the parties which are involved in this action do not depend upon the validity of such trust. By the terms of the instrument, the trust in reference to the real property was to continue only during the life of the mortgage

to the German Savings and Loan Society therein provided for, and therefore terminated with its satisfaction and the payment and extinguishment of the indebtedness secured thereby. The power given to the trustees to manage and control the property was to continue only "until the full payment of the said mortgage debt," and their authority to lease the property upon the expiration of the term then outstanding was only "for a term not to exceed the term of this trust." The mortgage debt to the German Savings and Loan Society was fully paid and the mortgage itself satisfied May 17, 1898, and at that date the purpose of the said trust ceased and the trust itself thereby terminated. For the purpose of the present action it is therefore immaterial whether the said trust, as is contended by the appellant, is to be regarded as having been invalid from the beginning, by reason of an attempted suspension of the power of alienation, or whether the provision therein for a reconveyance upon its termination to the creators of the trust is within the principles declared in *Sacramento Bank v. Alcorn*, 121 Cal. 379, or is to receive the same construction as would a direction to convey the property to a beneficiary (*Estate of Fair*, 132 Cal. 523¹), or whether it be held that by the termination of the trust the estate of the trustees has ceased. (Civ. Code, sec. 871.) If the trust was invalid from the beginning, the title and estate of the owners of the land was not affected thereby; and if it was valid, it has terminated and the estate of the trustees has ceased, and the rights of the owners of the land can be adjudicated in a court of equity or in a proceeding like the present one without the necessity of an actual reconveyance thereof from the trustees. The finding of the court that the moneys received upon the mortgage of May 17, 1898, were obtained for the purpose of paying off the mortgage indebtedness to the German Savings and Loan Society and that said mortgage was made "pursuant to the agreement of May 23, 1889," and for the purpose of a more effectual carrying out of the provisions of said agreement, is not to be construed as a finding that the mortgage to Purcell was impressed with any of the trusts declared in the instrument of 1889, and that by uniting in the execution of the mortgage the trustees were acting under the said trust, or that their act was attended with any validity. The

¹ 84 Am. St. Rep. 70.

instrument of 1889 declared that the trustees therein named should "at all times keep the premises free from any and all encumbrances other than the mortgage hereinbefore referred to"—the mortgage to the German Savings and Loan Society. The execution of the mortgage to Purcell in 1898 by them "as trustees" was in contravention of the terms of this trust, and therefore void. (Civ. Code, sec. 870.) The finding that the mortgage was made pursuant to the agreement of May, 1889, receives full effect by construing it in connection with the provision in the agreement by which the amount of the indebtedness of each of the parties to the instrument was to constitute a lien upon his share of the real property and be secured by the mortgage to that extent. The mortgage to Purcell is to be regarded, as between the mortgagors therein, merely as creating a lien upon land to the extent of their respective liability for the debt secured thereby. By the instrument of 1889 they had agreed, as between themselves, that the portion of the twenty-four thousand dollars received upon the mortgage then contemplated, which should be paid in satisfaction of their respective liabilities, should to that extent be a lien upon their respective interests in the land, and at the time of the execution of the mortgage to Purcell this lien had been extinguished as to some of the cotenants, and by the judgments thereafter rendered in the superior court the amount of the indebtedness of the plaintiff, for which his interest in the real estate was secured by the mortgage to Purcell, was ascertained and determined.

The right of the plaintiff to the relief sought by him is therefore not affected by the provision in the agreement of May, 1889, but is to be determined upon the consideration of other principles. Section 752 of the Code of Civil Procedure gives to any one or more of several cotenants of real property a right of action for its partition according to the respective rights of the persons interested therein, and for a sale of said property if partition cannot be had; and in the succeeding sections provision is made for ascertaining the respective rights of the parties to the action and for the satisfaction or other disposition of any liens thereon; and although a party may by some act or agreement on his part estop himself from enforcing his right to a partition, the mere fact that his interest in the land is subject to a lien or encumbrance will

not of itself operate as such estoppel. The fact that the interest of the plaintiff in the land in question is subject to a lien for certain indebtedness which can be at any time discharged by the payment of said debt, and for whose payment the court is authorized to provide in its judgment of partition or sale, does not deprive him of the right to maintain the action.

The superior court, therefore, erred in holding that the plaintiff is not entitled to maintain the present action. It should have determined the respective interests of the owners of the land and the amount of the liens and encumbrances upon the same, or upon the interest of any of them, and if, as between the said owners, any portion of said encumbrances ought, under the rules of equity or by virtue of any contract, to be borne by one or more of the owners, it should make proper provision for satisfying the same out of the share or shares against which it is chargeable.

The judgment ought therefore to be reversed.

Cooper, C., and Gray, C., concurred.

For the reasons stated in the foregoing opinion the judgment is reversed. Shaw, J., Angellotti, J., Van Dyke, J.

Hearing in Bank denied.

[S. F. No. 3044. Department Two.—October 25, 1904.]

JOHN H. DUNHAM, Appellant, v. JAMES S. ANGUS et al.,
Respondents.

**BEACH AND WATER-LOTS OF SAN FRANCISCO—SALE UNDER EXECUTION—
POWER OF LEGISLATURE—SUBSEQUENT SALE BY COMMISSIONERS OF
FUNDED DEBT.**—The city of San Francisco held its beach and
water-lot property as a private proprietor, and such property was
subject to execution for the city's debt, and remained subject to
execution therefor until the debt was paid, which right the legis-
lature could not impair. An action for a prior debt of the city,
begun before the passage of the act of May 1, 1851, which pro-
vided for a conveyance of such property to the commissioners of
the funded debt, and a sale of water-lots under execution upon
the judgment in such action, made after the passage of that act,

will prevail over a subsequent deed of the same property by the commissioners of the funded debt, executed under the authority given by that act.

Id.—CASE APPLIED AND AFFIRMED.—The case of *Smith v. Morse*, 2 Cal. 524, applied and affirmed, as controlling authority.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

E. G. Knapp, for Appellant.

W. S. Goodfellow, for Respondents.

McFARLAND, J.—Plaintiff appeals from a judgment in favor of defendants and from an order denying his motion for a new trial.

The action is to quiet title to a lot of land which is a part of what is known as the beach and water-lots of the city of San Francisco. The appellant claims title through a sale of the property in contest by the commissioners of the funded debt created by an act of the legislature approved May 1, 1851. (Stats. 1851, p. 387.) Respondents claim under what is known as the "Peter Smith title," which, as against the alleged title of the said commissioners of the funded debt, was a prominent subject of litigation during the first years of the history of California as an American state. The various statutes, ordinances, and other facts touching the controversy are fully set forth in the report of the case of *Smith v. Morse*, 2 Cal. 524, and need not be here stated in detail. For the purpose of this decision the following brief statement is sufficient: In 1850 the city of San Francisco passed an ordinance under which certain of its property, including the lot involved in this action, was conveyed to certain trustees styled the commissioners of the sinking fund, who were given power to sell, etc. On May 1, 1851, the act of the legislature above referred to creating the commissioners of the funded debt was passed, and by that act the said commissioners of the sinking fund were directed to convey all of the property held by them under said ordinance to the commissioners of the funded debt, which was done. The commissioners of the funded debt were

authorized to sell the property, and they did, on September 20, 1852, sell and convey the lot here in question to Joseph Hetherington, from whom the appellant has a clear deraignment of title. But in 1850 and 1851 Peter Smith was a creditor of the city in large amounts; and on January 14, 1851,—which was before the passage of said act of May 1, 1851,—he commenced an action on a part of the indebtedness of the city to him, and on September 6, 1851, he recovered a judgment against the city for the sum of about fourteen thousand dollars; and execution was regularly issued on said judgment under which the property here in contest was sold on January 30, 1852, to David S. Douglass, who afterwards received the sheriff's deed to the same; and whatever interest in the property Douglass thus obtained passed by mesne conveyances and vested in the defendants in this present action. Peter Smith had also in 1851 commenced two other actions for other parts of this indebtedness, in which judgments had been rendered prior to May 1, 1851.

The question in the case at bar, therefore, is, Which is the better title—the one claimed by appellant under the sale from the commissioners of the funded debt, or the other claimed by respondents under the execution sale on the Peter Smith judgment of September 6, 1851? And we think that this question was definitely settled against the contentions of the appellant by the case of *Smith v. Morse*, above noticed—2 Cal. 524.

Smith v. Morse was an action brought by Peter Smith against Morse and others constituting the said commissioners of the funded debt, in which plaintiff sought to have it adjudged that, as against him as a creditor of the city, the commissioners had no title to the water property which had been levied upon and sold under his judgments, and to enjoin them from asserting any such title, and thus injuriously affecting the value of his interest therein. The judgment was in favor of Smith in the trial court, and upon appeal it was affirmed. It is contended by appellant in the case at bar that the case of *Smith v. Morse* reached and determined only the rights of Smith under his first two judgments, which had been rendered prior to May 1, 1851, when the act creating the commissioners of the funded debt was passed. But in his amended and supplementary complaint he expressly set up his rights under the third judgment of September 6, 1851, and asked a similar

remedy as to those rights. The court clearly dealt with all three of the judgments, and, indeed, Smith's rights under the last judgment seemed to be those principally involved, for it seems from the statement of the case in the record that the two prior judgments had been satisfied; and the trial court stated in its finding that "a part of the judgment aforesaid rendered on the 6th day of September, 1851, remains unsatisfied." The preliminary injunction restraining the commissioners from selling, etc., was by the final judgment made perpetual. The judgment was affirmed on appeal; and in an elaborate opinion the appellate court held first that the ordinance above mentioned by which it was attempted to transfer the property to the commissioners of the sinking fund was invalid for want of authority in the common council to do so, and consequently the deed from the said commissioners to the commissioners of the funded debt conveyed nothing. But as it was contended that the act of May 1, 1851, itself had the effect of a conveyance to the commissioners of the funded debt, the court took up that branch of the subject, and held that, assuming such to be the effect of that act, the act, as against Smith, was unconstitutional and void, because impairing the obligation of a contract. It was declared that the city held that water-lot property as a private proprietor, and it was therefore liable for the city's debt, and that "such property as was subject to execution at the time the debt was contracted must remain subject to execution until the debt is paid." The facts as stipulated in the case at bar seem to bring it entirely within the decision in *Smith v. Morse*; and as during the long time since the rendition of that decision many titles have no doubt been taken upon the faith of it, we have no disposition to now question it. The respondents over the objection of appellant were allowed to introduce the record in the case of *Smith v. Morse* as it appears in the report of the case in 2 Cal. 524, and appellant contends that this ruling of the court was erroneous; but that ruling was immaterial, for the case is controlling as an authority, even if appellant is not technically estopped by it.

The judgment and order appealed from are affirmed.

Henshaw, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[Crim. No. 1151. In Bank.—October 26, 1904.]

THE PEOPLE, Respondent, v. HENRY MILTON, Appellant.

CRIMINAL LAW—MURDER IN FIRST DEGREE—ACCIDENTAL KILLING—INSTRUCTION PROPERLY REFUSED.—Upon a prosecution for murder committed in the perpetration of or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, under section 189 of the Penal Code, the court properly refused an instruction to the jury to the effect that in order to convict of murder in the first degree it must appear beyond all reasonable doubt that the defendant as a fact intended to take the life of the deceased, and that accidental killing, even in an attempt to commit one of the felonies mentioned in that section, is not murder in the first degree.

12.—CONSTRUCTION OF PENAL CODE—MURDER IN FIRST DEGREE.—Under section 189 of the Penal Code, murder committed by poison, lying in wait, or torture must be willful, deliberate, and premeditated to constitute murder in the first degree; but where the murder is committed in the perpetration of or an attempt to perpetrate arson, rape, robbery, burglary, or mayhem, the killing, whether intentional or unintentional and accidental, constitutes murder in the first degree.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

Henry C. Dibble, for Appellant.

U. S. Webb, Attorney-General, and J. C. Daly, Deputy Attorney-General, for Respondent.

HENSHAW, J.—The defendant was convicted of the crime of murder in the first degree and sentenced to death. Upon his appeal he presents but one alleged error of the trial court upon which he seeks a reversal of the judgment. This alleged error lay in the court's refusal to give the following instruction: "The court instructs you that before you can convict the defendant of murder in the first degree you must find to a moral certainty and beyond all reasonable doubt that the defendant, as a fact, intended to take the life of the deceased.

Accidental killing, even in an attempt to commit one of the felonies mentioned in section 189 of the Penal Code, is not murder in the first degree."

While none of the evidence is presented to us with this appeal, it will be assumed from the general tenor of the instructions actually given by the court that the charge against the defendant was for a murder committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem. (Pen. Code, sec. 189.)

The court properly refused to give the proposed instruction. Defendant insists that in every crime of murder in the first degree there must be shown to be present the elements of willfulness, deliberation, and premeditation bearing upon the actual intent to take human life. But such is not our law of murder. The only indispensable elements of murder under our code are,—1. The unlawful killing of a human being; and 2. That this killing be done with malice aforethought. (Pen. Code, sec. 187.) This malice is present and express when a deliberate intention unlawfully to take away the life of a fellow-creature is shown, and it is also present (though implied) when the circumstances attending the killing disclose an abandoned and malignant heart. (Pen. Code, sec. 188.) In section 189 of the Penal Code three kinds or classes of murder in the first degree are specifically enumerated: 1. All murder which is perpetrated by means of poison, or lying in wait, or torture is murder in the first degree; 2. All murder which is perpetrated by any other kind of willful, deliberate, and premeditated killing is murder in the first degree; 3. All murder which is committed in the perpetration of or attempt to perpetrate arson, rape, robbery, burglary, or mayhem is murder in the first degree. Of the first of these classes it is sufficient to note that the means adopted for the unlawful killing furnish evidence of willfulness, deliberation, and premeditation, and this is made perfectly plain by the context of the section which declares to be murder in the first degree all murder which is perpetrated by these means, or by *any other kind* of willful, deliberate, and premeditated killing. As to such a killing, when perpetrated by means of poison, it has been held under the language of a statute similar to ours (and held in consonance with common sense and natural justice) that it was necessary to establish the unlawful intent or pur-

pose in the administration of the poison. (*Bechtelheimer v. State*, 54 Ind. 128.) The decision was based more upon the nature of the case than the language of the statute, as is said by the same court in reviewing that case in the later one of *Moynihan v. State*, 70 Ind. 126,¹ where it is pointed out that unless the unlawful intent in administering the poison is made to appear, the most innocent act of one's life might turn out to be a murder, and that, too, a murder subjecting him to the gallows; so that one who innocently administered what he supposed to be a proper dose of medicine would be compelled to endure this ultimate indignity and disgrace, notwithstanding the fact that in such administration of the poison no penal law was violated and no moral turpitude shown. In such an exceptional case, however, it is to be noted that neither element of our crime of murder is present. The killing being the result of inevitable casualty is not violative of the law, and in that sense, therefore, is not unlawful, and, of course, there is a complete absence of malice express or implied.

The second class of cases which are designated murder in the first degree embrace all other non-specified instances where the unlawful killing is shown to have been committed with willfulness, deliberation, and premeditation. The extreme penalty of the law is imposed for such offenses by reason of the manner in which they are committed. There is no occasion to mitigate the punishment because of the known weaknesses, frailties, and passions of mankind, since proof of the deliberation and premeditation precludes the idea that the slayer was dominated by such passions.

But when we come to the third kind of murder in the first degree it will be seen that in its nature it is wholly distinct from the two preceding classes. In this the law has said to the malefactor: If in your perpetration of or attempt to perpetrate arson, rape, robbery, burglary, or mayhem you shall take the life of a fellow-being, intentionally or unintentionally, your crime is murder of the first degree. The killing may be willful, deliberate, and premeditated, or it may be absolutely accidental. In either case, you are equally guilty. The elements of willfulness, deliberation, and premeditation are not indispensable to your crime. The murder, under section 187 of the Penal Code, is established, in that the killing is unlaw-

¹ 86 Am. Rep. 173.

ful, it having been perpetrated in the performance or attempt to perform one of these felonies, and the malice of the abandoned and malignant heart is shown from the very nature of the crime you are attempting to commit. Therefore, if in perpetrating arson, although in the belief that the building is unoccupied, some person within the building, unknown to you, shall lose his life, you are guilty of murder in the first degree. Or if in burglariously entering premises which you believe to be unoccupied you shall accidentally take the life of one whose presence is unsuspected by you, still your crime is murder in the first degree.

That such is the true meaning and construction of our statute there can be no doubt. *Commonwealth v. Green*, 1 Ashm. 289, and *Keenan v. Commonwealth*, 44 Pa. St. 55,¹ the only cases which the appellant presents for consideration, both have to do with deliberate and premeditated homicide, and the discussion of the court was in reference to this form of murder. In the first a soldier with his musket shot his drill-sergeant, after having threatened to do so. In the second the conductor of a street-car, after admonishing a noisy and boisterous passenger to be quiet, attempted to eject him, and was stabbed to death. Neither of these, it will be observed, has any bearing upon the crime here under consideration.

It will be noted that at common law murder was carried into the unlawful killing of a human being in the perpetration of any misdemeanor, and death was the penalty which followed. The rigor of the common law has been modified by our code section, which is drawn from the laws of New York as they stood in 1860. In *Buel v. People*, 78 N. Y. 492,² will be found an exposition and consideration of the changes made in the New York statutes relative to the crime of murder. The court there quotes the first statute, which was to the effect that the killing shall constitute murder "when perpetrated without any design to effect death by a person engaged in the commission of a felony." "The killing," says the court, "while engaged in the perpetration of any felony which caused death, even if unintentionally, is here expressly declared to be murder." The court proceeds: "The statute of 1873 was then passed, which is precisely like the statute of 1876, already cited, except that the words 'without any design to effect

¹ 84 Am. Dec. 414.

² 34 Am. Rep. 555.

death' are omitted in the latter statute. The evident purpose of omitting these words was to make any killing, while engaged in the perpetration of a felony, murder in the first degree, no matter what the design was, or whether it was intentional or casual. So that a person engaged in the commission of the crime of arson, burglary, rape, or any other felony, who killed another, was chargeable with murder in the first degree. Under all of these various provisions, where the killing was perpetrated, it was of no consequence what the intention was. The statute was aimed against any killing by a criminal while committing any of the felonies enumerated, and the last amendment while engaged in the commission of any of the numerous felonies known to the law. The striking out of the words 'without any design to effect death' was no doubt designed to avoid any necessity of showing that there was no such intention, and to make the law more explicit and clear."

For the foregoing reasons the judgment appealed from is affirmed.

Beatty, C. J., McFarland, J., Van Dyke, J., Angellotti, J., and Lorigan, J., concurred.

Rehearing denied.

[S. F. No. 4090. In Bank.—October 27, 1904.]

JOSEPH N. HARRISON, Petitioner, v. ROBERT W. ROBERTS et al., Respondents.

FREEHOLDERS' CHARTERS—TIME FOR SUBMITTING AMENDMENTS—CONSTRUCTION OF CONSTITUTION—MANDAMUS.—Section 8 of article XI of the constitution, providing that a ratified freeholders' charter "may be amended at intervals of not less than two years by proposals therefor, submitted by the legislative authority of a city to the qualified electors thereof at a general or special election," etc., has sole reference to the intervals between elections upon proposed amendments; and the submission of a proposed amendment at a general election to be held within less than two years after a prior special election, at which amendments to the charter were sub-

mitted and approved, is invalid, and cannot be enforced by writ of mandate,

Id.—“**LEGISLATIVE AUTHORITY OF CITY**”—**MAYOR NOT INCLUDED**.—The mayor is not included in the “legislative authority of a city,” within the meaning of section 8 of article XI of the constitution; and a proposed amendment to the freeholders’ charter of the city and county of San Francisco, proposed by the board of supervisors, which constitutes the “legislative authority” thereof, need not be presented to the mayor for his approval.

PETITION for Writ of Mandate to Board of Election Commissioners and Registrar of voters of the City and County of San Francisco.

The facts are stated in the opinion of the court.

Lane, Lederman & Lane, and Cameron H. King, for Petitioner.

Percy V. Long, James A. Devoto, Devoto & Richardson, and John S. Partridge, for Respondents.

ANGELLOTTI, J.—An application was made to this court for a writ of mandate, requiring defendants, who are the board of election commissioners and the registrar of voters of the city and county of San Francisco, to prepare and cause to be printed upon the ballots to be used at the general election to be held on November 8, 1904, a column with voting squares whereby the electors may indicate their votes upon certain proposals to amend the charter of said city and county, which, it is claimed, should be voted on at such election.

As it was necessary to immediately act upon the application, the matter was decided by this court on October 21, 1904, without the filing of any written opinion. By that decision, the application for a writ of mandate was denied. This opinion is now filed, to indicate the views of the court upon the questions presented by the application.

The main question presented by the application is as to the proper construction of the provisions of the constitution relative to the time when proposed amendments of a municipal freeholders’ charter may be ratified by the electors of the municipality.

The provision of the constitution under which a freeholders’

charter may be amended is as follows: "The charter, so ratified, may be amended at intervals of not less than two years by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof, at a general or special election, held at least forty days after the publication of such proposals for twenty days in a daily newspaper of general circulation in such city, and ratified by a majority of the electors voting thereon, and approved by the legislature, as herein provided for the approval of the charter." (Const., art. XI, sec. 8.)

It will thus be seen that it is essential to any amendment that a proposal therefor be submitted to the qualified electors of the municipality at a general or special election, and that such proposal be "ratified" by a majority of the electors voting thereon. This proposal must emanate from the "legislative authority" of the municipality, and, by reason of another provision of the constitution, such legislative authority *must* submit to the electors any proposed amendments petitioned for by fifteen per cent "of the qualified voters of the city." Amendments "ratified" by the electors, like the original charter, may be "approved" or rejected as a whole by the legislature of the state, which body, however, has no power of alteration or amendment thereof. Such approval may be made by concurrent resolution, and the amendments take effect only upon such approval being given. The constitution explicitly provides, as appears from the portion hereinbefore quoted, that the charter may be "amended" only at intervals of not less than two years.

It appears that on December 4, 1902, a special election was held in the city and county of San Francisco, at which election there were submitted to the electors thereof for ratification certain proposed amendments to the charter. These amendments had been proposed by the legislative authority by resolutions adopted at different dates between July 12 and August 10, 1902. At this election certain of the amendments so proposed were ratified by the necessary majority of the electors, and said amendments were on February 5, 1903, approved by the legislature, by concurrent resolution. (Stats. 1903, p. 583.)

It thus appears that two years will not have expired on November 8, 1904, since certain proposed charter amendments,

subsequently approved by the legislature, were ratified by the electors of the city and county of San Francisco.

If the constitutional provision quoted above, in so far as it declares that the charter "may be amended" only "at intervals of not less than two years," has reference solely to the time of the general or special election at which a proposed amendment is submitted for ratification, it must be admitted that any ratification by the electors of the amendments here proposed, had within two years of December 4, 1902, would be in violation of such constitutional provision, and therefore invalid.

That such is the proper construction of that provision, we entertain no doubt. The correctness thereof is more clearly perceived on a consideration of the only other constructions possible. If the provision does not have reference solely to the date of election by the people, it must mean either that none of the steps essential to the taking effect of an amendment—viz., proposal, ratification by the people, and approval by the legislature—can be taken within two years after the approval of the legislature of a prior amendment, or simply that no charter amendment must be approved by the legislature within two years after a prior approval by the legislature of an amendment of the same charter.

It will be observed that the first of these constructions could not assist plaintiff in this proceeding, it being sought by him to have the proposals for certain amendments submitted to the electors within less than two years from the approval by the legislature of prior amendments, but we deem it proper to indicate our views thereon, as the question is one of importance to all municipal corporations existing under freeholders' charters.

The effect of this construction would be, that while the constitution in terms declares that "the charter . . . may be amended" at intervals of two years, amendments could in fact, in the absence of a special session of the legislature, be fully accomplished and put into effect only at intervals of nearly four years. Two years would be required to elapse after the approval of the amendment by the legislature before another proposal could be made by the legislative authority of a municipality, which, with the time required for notice of the election, would carry the matter beyond reach of the legis-

lature at the succeeding regular session and defer proceedings for practically another two years. It seems very clear that it was the intention that whatever is here authorized by the constitutional provision might be fully accomplished at intervals of two years.

The second construction suggested—viz., that the provision simply means that no charter amendment may be “approved by the legislature” within two years after a prior approval by the legislature of an amendment of the same charter—is the only one that could avail plaintiff in this proceeding. This construction would make the provision as to time referable solely to the approval by the state of an amendment theretofore ratified by the people of a municipality, and render it a prohibition on the legislature of the state, rather than a prohibition on the municipality.

Although the electors of the city had “ratified” the amendment, and the municipality had completed every act within its power to perform in a matter relating solely to its municipal affairs, the approval of the state could not be given until the lapse of precisely two years from a prior approval by the state of any amendment to the same charter.

The effect of this construction would be that proposed amendments might be submitted to the people of the municipality for ratification as often as the legislative authority of the city, or fifteen per cent of the electors thereof, expressed, in proper form, their desire for such submission. Special elections on amendments, with all the attendant disturbances and cost, could be as frequent as a few officers or a small minority of the electors might determine, and the prohibition as to time, undoubtedly inserted for some good purpose, would simply defer the ordinarily formal action by the state legislature, and the consequent taking effect of an amendment.

It is impossible to conceive of any good object to be attained by thus expressly deferring for a specified time simply the action of the legislature upon an amendment which has been ratified by the people of a municipality.

Such a provision would not in any substantial degree tend to permanency of charter provisions. Under our system of biennial sessions of the legislature, the approval of amendments can in the nature of things be had only at intervals of

approximately two years, in the absence of the very exceptional case of a special session, and therefore no provision as to the time of approval was necessary to insure practically all that could have been contemplated in the way of permanency by the provision under consideration.

A mere delay for a few days by the legislature in the matter of the approval of amendments ratified by the electors could not have been the object sought to be attained.

The real essential to an amendment is, after all, the ratification by the people at an election. The submission of the proposal to amend is of course essential as a preliminary, for in no other way could an opportunity for the electors to formally express their desires be had, but, as already noted, a small minority of the electors may compel such submission. The approval by the legislature subsequent to the ratification has also been made essential to the taking effect of the amendment, but under our well-settled policy of municipal self-government in municipal affairs this approval is practically only a formal matter, where the subject-matter of the amendment is within the proper scope of the municipal charter. No instance of the rejection by the legislature of a proposed municipal charter or any amendment thereto has yet been recorded, so far as we have been able to find. When amendments to a charter have once been ratified by the necessary number of electors, it is practically settled that they will in due course be approved and take effect. The legislature, it is true, has the power to reject them, but it could never have been contemplated that this power would be exercised, except so far as might be necessary in the protection of the interests of the state and the citizens of the state, as contradistinguished from the interests of the municipalities. Practically, it is the ratification of the proposal for amendment by the electors of the municipality that determines the change in charter provisions, and any provision of law designed to obtain more or less permanency in the terms of the charter, to be effectual,—would naturally be addressed to the time of such ratification,—i. e. to the general or special election at which the amendment is voted upon. That this was one of the objects of the provision under discussion is very clear. This court has already said thereof in *Blanchard v. Hartwell*, 131 Cal. 263, 265: "Here is a clear and positive constitutional policy calcu-

lated to insure some degree of permanency, and to prevent frequent changes."

Another apparent object of the limitation as to time was to protect the municipality against the expense and disturbance of frequent elections. Economy and a certain degree of permanency in charter provisions are the only objects of such a limitation that can reasonably be suggested, and these objects can be substantially subserved by no other reasonable construction of the constitutional provision before us, than the one to the effect that the limitation as to time has reference solely to the general or special election at which proposed amendments are submitted for ratification by the electors of the municipality.

Our conclusion upon this question is, that the only effect of the limitation as to time is to prohibit a submission for ratification by the electors of any proposed amendment within two years from the submission for ratification of any prior amendment; in other words, that proposals for amendments may be submitted at elections only at intervals of two years.

It is suggested that the practical effect of this decision will be in this instance to put the city and county of San Francisco to the expense of a special election on the proposed amendments, if such amendments are to be acted upon at the next session of the legislature. This is of course true, but we are unable to see how it affects the question as to the proper construction of the constitutional provision. The practical effect of our construction of the constitutional provision will also be, that a municipality can be put to such expense only once in every two years, while the construction contended for would give the municipality as many special elections on such questions as the legislative authority of the city or fifteen per cent of the electors thereof desired.

It was contended by respondents that said proposals were not legally adopted by the board of supervisors, in that the resolutions therefor were not signed by the mayor of the city or presented to him for his signature or approval. The constitution declares that the proposals are to be submitted by the "legislative authority of the city."

The charter of San Francisco declares (art. II, chap. I, sec. 1; Stats. 1899, p. 244): "The legislative power of the city and county of San Francisco shall be vested in a leg-

islative body, which shall be designated the board of supervisors." And section 1 of chapter I of article IV declares that the mayor is the chief executive officer of the city and county.

The "legislative authority" of the city and county is therefore vested in the board of supervisors. The requirement in section 16 of chapter I of article II, that certain bills and resolutions which shall have been passed by the board of supervisors shall be presented to the mayor for his approval, gives him a qualified veto upon the action of the board, but does not make him a constituent part of the legislative authority of the city and county. The provision in this section is moreover limited to the bills and resolutions "hereinbefore provided," and does not include proposals for amendments to the charter. The provision in section 5 of chapter I of article II, that he shall be presiding officer of the board of supervisors, confers upon him no more legislative authority than is given to the lieutenant-governor by being president of the senate.

Under the provisions of section 34 of the Street Improvement Act, that the term "city council" includes a body or board which under the law is the legislative department of the government of any city, it was held in *McDonald v. Dodge*, 97 Cal. 112, that the board of supervisors of San Francisco is the body which forms the legislative department of the government of the city, the court saying: "It is true that the mayor, by virtue of his right of veto in certain cases, has some of the lawmaking power of the municipality; but the charter of the city does not make him a part of the 'legislative department,' in the sense that no independent power is or can be given to the latter."

In *Jacobs v. Board of Supervisors*, 100 Cal. 121, it was held that the constitutional provision for the fixing of water rates by the board of supervisors or other governing body of the city and county did not require the ordinance fixing such rates to be presented to the mayor of San Francisco for his approval. (See, also, *Brooks v. Fischer*, 79 Cal. 173; *Truman v. Supervisors*, 110 Cal. 128.)

It must be held, therefore, that it was not necessary that the proposals for amendment should be concurred in by the mayor or presented to him for approval.

The application for the writ of mandate having been already denied, no further order is necessary.

McFarland, J., Van Dyke, J., and Henshaw, J., concurred.

Mr. Justice Shaw, who is now temporarily absent, concurred in the order heretofore made.

Petition for modification of judgment denied.

[Sac. No. 1265. Department Two.—October 28, 1904.]

RECLAMATION DISTRICT NO. 551, Respondent, v. P. J. VAN LOBEN SELS, Respondent, and SOPHIA McCULLOUGH, Appellant.

RECLAMATION DISTRICT—TITLE BY DEED UPON CONDITION SUBSEQUENT—

RIGHTS OF GRANTEE—REVERSION TO GRANTOR OR ASSIGNS.—Under a deed to a reclamation district for the purposes of reclamation only which provides that if the land shall cease to be used for such purposes the same shall revert to the grantor, and the interest of the grantee shall cease, the grantee has no right to use the land principally for other or different purposes; and if the reclamation district of its assigns should cease to use the land for the purposes specified, it would revert to the grantor or his assigns.

Id.—PRESUMPTION AGAINST FORFEITURE—BURDEN OF PROOF.—Every presumption is against a forfeiture of the estate of the reclamation district, and the burden is on the party claiming that the land has reverted to the grantor to show clearly that the land has ceased to be used for the prescribed purpose of reclamation. Conditions providing for the forfeiture of an estate are to be construed liberally in favor of the holder of the estate and strictly against the enforcement of the forfeiture.

Id.—RECLAMATION NOT ENDED—FINDING SUPPORTED BY EVIDENCE—

JUDGMENT PROTECTING RIGHTS.—Where the evidence shows that the work of reclamation was not ended, and that use was still made of the land by the reclamation district, a finding that the land has never ceased to be used for reclamation purposes is sufficiently supported; and where the judgment for the plaintiff protects the rights of appellant, and provides that where the "property shall cease to be used for reclamation purposes it shall revert" to the appellant, who is the assignee of the grantor, the appellant is entitled to no relief.

Id.—JUDGMENT DEFINING RIGHTS BETWEEN RECLAMATION DISTRICT AND ITS ASSIGNEE.—The fact that the judgment for the plaintiff defines

the rights of the plaintiff and its assignee as between themselves is no concern of the appellant.

ID.—TRIAL—WAIVER OF OBJECTION—AGREEMENT UPON FACTS—EVIDENCE NOT OBJECTED TO.—Where the record shows that all the parties agreed on certain facts, and no objection was made to evidence on the ground that no issue was joined by the pleadings justifying such evidence, objection upon that ground was waived.

ID.—MARRIED WOMAN—NON-JOINDER OF HUSBAND—WAIVER.—The appellant waived objection on the ground that she was a married woman and that her husband was not a party to the action when she did not raise the objection in the lower court by demurrer or answer.

APPEAL from a judgment of the Superior Court of Sacramento County. J. W. Hughes, Judge.

The facts are stated in the opinion.

White & Miller, for Appellant.

A. L. Shinn, for Reclamation District, Respondent.

Olney & Olney, for P. J. Van Loben Sels, Respondent.

COOPER, C.—Action to quiet title. Judgment was entered in favor of plaintiff and defendant Van Loben Sels, and against defendant McCullough, who has appealed therefrom on the judgment-roll and a bill of exceptions.

The controversy is about a small lot of 2.6 acres described in the complaint by metes and bounds. Plaintiff is a reclamation district organized under the laws of California for the purpose of reclaiming swamp and overflowed lands.

In September, 1895, one Olsen was the owner of the lot, and in consideration of \$924.88 conveyed the same to plaintiff by grant, bargain, and sale deed. The deed contained the following concluding clause: "To have and to hold the same unto the said Reclamation District No. 551, its successors and assigns, for the purpose of reclamation only; that is, for the purpose of constructing and maintaining thereon reclamation-works consisting of levees, pumps and pump-house, drains, ditches, and other reclamation-works used in and about the reclamation of the lands of said Reclamation District No. 551, and if said lands shall cease to be used for such purposes, the same shall thereupon revert to the said party of the first part, and all right, title, and interest of said party of the second part therein shall be terminated and ended."

After the deed was delivered the plaintiff entered into possession of the lot and constructed reclamation-works thereon, and said land has ever since been used for reclamation purposes, and has never ceased to be so used.

In April, 1902, the plaintiff conveyed the land by deed to defendant Van Loben Sels, "reserving to plaintiff the right to use a convenient and necessary part of the building on said premises as a storehouse for its tools and appliances used for the purposes of reclamation."

In October, 1898, Olsen conveyed to defendant McCullough all his title and interest in the land, and she is still the owner of whatever title remained in Olsen after the conveyance to plaintiff.

Appellant in her answer alleged that she was the owner in fee of the land, through her deed from Olsen; that she was in possession thereof; that plaintiff has ceased to use the same for reclamation purposes, and had abandoned and lost all its right in and to the premises; and finally, prayed judgment that she was the owner of the premises, free of any easement or right of any kind in plaintiff.

The judgment, while against defendant, contained the clause "that in case said real property shall cease to be used for reclamation purposes, the same shall thereupon revert to the defendant, Sophia McCullough, and all the right, title, and interest of the said plaintiff and the defendant, P. J. Van Loben Sels, therein shall be terminated and ended."

While the discussion in the briefs has covered considerable ground and a variety of questions, we think the case on its merits involves only two propositions—the construction of the deed made by Olsen to plaintiff, and the sufficiency of the evidence to sustain the findings of the court that the land has never ceased to be used for reclamation purposes. Without discussing the many cases cited by counsel, we think the construction of the deed by its own language is easy of solution. The plaintiff is a reclamation district, created and organized for the purpose of reclaiming lands in the district, and constructing, maintaining, and keeping in repair all works necessary for the reclamation of the land embraced in the district. The deed was for the purpose of reclamation only. When the land should cease to be used for such purpose it was to revert to the grantor. The title passed out of the grantor for the

purposes therein specified, and when it shall cease to be used for such purposes the estate of the grantee ceases. The grantee has no right to use the land principally for other or different purposes. If it or its assigns should cease to use the land for the purpose therein specified, and use it for farming or other different purposes, it would revert to the grantor or his assigns. In such case every presumption is against a forfeiture, and the party claiming that the land has reverted to the original grantor must clearly show that the land has ceased to be used for the purpose for which it was granted. If the grantee or his assigns continue to use the land for the prescribed purpose, the estate continues in such grantee. Conditions providing for the forfeiture of an estate are to be construed liberally in favor of the holder of the estate, and strictly against the enforcement of the forfeiture. (Civ. Code, sec. 1442; Washburn on Real Property, 447; *Behlow v. Southern Pacific R. R. Co.*, 130 Cal. 19; *French v. Inhabitants of Quincy*, 85 Mass. (3 Allen) 9.)

The finding of the court that the land is used for reclamation purposes, and has never ceased to be so used, is supported by the evidence. The evidence shows that immediately upon acquiring the property the plaintiff built a pumping-plant upon it, on the west end thereof near the river, and excavated a ditch along the southern portion of it. It is true that the plaintiff afterwards ceased to use the pumping-plant, but the ditch has remained open, and drains the seepage water from the river to the main drainage canal in the center of the district. Plaintiff has continued to use the pump-house for the purpose of storing its coal, sacks, and tools, and some of its employees have used the rooms in the upper story. It does not lie in the mouth of appellant to say that it is not necessary for plaintiff to use the pumping-house or the ditch for reclamation purposes. When she took her conveyance it was with full knowledge of, and subject to, plaintiff's rights. Her grantor had previously conveyed the premises for a consideration, which he received.

It appears that the plaintiff conveyed the premises to defendant Van Loben Sels in April, 1903, reserving the right "to use a convenient and necessary part of the building on said premises for its tools and appliances used for the purpose of reclamation." This deed does not of itself show that

the premises had ceased to be used for the purposes of reclamation. The deed made by Olsen was to hold to plaintiff, "its successors and assigns." If the deed to defendant Van Loben Sels was beyond the power of plaintiff to make, and void, as argued by appellant at great length, the result would be that the plaintiff is still the owner of the property. The fact that the judgment defines the right of plaintiff and defendant Van Loben Sels as between themselves is no concern of appellant. Plaintiff was certainly entitled to judgment on the findings, and if the premises are still being used for reclamation purposes, appellant is entitled to no relief. The judgment protects her rights. It expressly declares that when the "property shall cease to be used for reclamation purposes, the same shall revert to the defendant Sophia McCullough." It is true that no cross-complaint or answer of Van Loben Sels appears to have been served on appellant, but in her answer she directly alleges "that neither the plaintiff nor the defendant P. J. Van Loben Sels has any right, title, interest, or claim of any kind in or upon the said real property, or any part thereof." She prayed for a decree adjudging her to be the owner in fee of the property. She does not appear to have served her answer upon defendant Van Loben Sels. She did not object to the evidence offered by defendant Van Loben Sels upon the ground that there was no issue made between her and Van Loben Sels by the pleadings, nor did she object upon any ground or at all. In fact the record shows that all the parties agreed on certain facts, and no separate trial was had as between plaintiff and appellant. Finally, appellant claims that she is a married woman, and her husband was not made a party to the action. As she did not raise the objection in the lower court by demurrer or answer, it was waived. (Code Civ. Proc., sec. 434.)

The judgment should be affirmed.

Gray, C., and Harrison, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. McFarland, J., Lorigan, J., Henshaw, J.

[Crim. No. 1180. In Bank.—October 23, 1904.]

Ex Parte JOHN B. CLIFTON, on Habeas Corpus.

CRIMINAL LAW—SENTENCES FOR DISTINCT CRIMES—CREDITS FOR GOOD BEHAVIOR.—Where the accused was convicted of two distinct crimes, and was sentenced at the same time therefor for two distinct terms, one to commence upon the termination of the other, the credits for good behavior to which the prisoner is entitled under the act of 1863 are to be computed on each term separately, and not as though the two sentences constituted but one term.

APPLICATION for discharge under Writ of Habeas Corpus directed to the Warden of the State Prison at Folsom.

The facts are stated in the opinion of the court.

E. S. Wachorst, and Frank J. Murphy, for Petitioner.

U. S. Webb, Attorney-General, for Respondent.

LOBIGAN, J.—Petitioner seeks, upon *habeas corpus*, to be released from imprisonment in the state prison.

In September, 1897, he was convicted in the superior court of Los Angeles County on two separate charges of burglary in the second degree, and as punishment for the first offense was sentenced to imprisonment in Folsom for five years, and on the second was sentenced for a similar term in the same prison, the latter sentence to commence, as provided by section 669 of the Penal Code, at the expiration of the term of imprisonment imposed by the prior sentence. Having actually served (up to the time of filing this petition) a period of six years and eight months, and having earned, as he claims, credits for good behavior under section 20 of the act of 1889 (Stats. 1889, p. 410) to the extent of three years and six months, he insists that he is now entitled to be discharged from imprisonment.

The only point involved in this matter is whether, in computing the credits for good behavior to which petitioner is entitled, the two sentences of five years each are to be taken as constituting a continuous term of ten years, or do they constitute separate, distinct, and independent terms of five years each.

If, for the purpose of computing credits, the two terms con-

stitute a continuous or entire term of ten years, then petitioner is entitled to his discharge, because, under the act, the time he has served, added to the credits he has earned upon the basis of a continuous term, has terminated his period of imprisonment. On the other hand, if, under the act, the terms are to be considered separate and distinct, the petitioner must be remanded, as he has not served sufficient time and earned sufficient credits upon the second term of imprisonment imposed to warrant his discharge.

The solution of this question must be determined from the language of the act itself, read in the light of previous legislation upon this subject. The only previous legislation on the matter, necessary to be particularly considered, is that found in the Statutes of 1867-1868, page 675, which upon the adoption of the codes was substantially carried into the Penal Code as section 1590 thereof, and which provided that in deducting credits for good conduct in favor of a convict they should be deducted from "the entire term of penal servitude to which he has been sentenced." In *Ex parte Dalton*, 49 Cal. 465, this court held, where a person was convicted of two offenses for which he was sentenced to ten years for each offense, that within the intent of the statute, and as a basis for allowing credits, "the entire term of penal servitude" must be considered as twenty years; that each period of ten years was but a part of the "entire term," and it is insisted by petitioner that the same construction should be applied to the provisions of section 20 of the act of 1889 upon the same subject.

Undoubtedly this should be done if the language in both sections of the statute were the same. But it is not. There is a radical and essential difference between the provisions of the original section 1590 of the Penal Code, construed in the *Dalton* case, and the language employed in the act of 1889, under which the matter at bar is to be determined.

Under the original section, considered in the *Dalton* case, it was apparent, as the court decided, that it was the intention of the legislature, from the language used, that, for the purpose of credit commutation in favor of a prisoner, cumulative sentences of imprisonment should be considered as an "entire term of penal servitude to which he has been sentenced."

The Dalton case was decided in 1875, and at its session of 1877-1878 (Amendts. to Codes, 1877-1878, p. 124) the legislature amended the original section so as to provide that the credit deductions for good behavior of a prisoner "shall be allowed from his term," and the new act of 1889, now in force, contains the same language.

We think it is manifest from this amendment of the original section so soon after the decision in the Dalton case, providing that the deduction of credits in favor of a prisoner "shall be allowed from his term" and not from the "entire term . . . to which . . . he has been sentenced," that the legislature intended that such deductions, when cumulative sentences were imposed, should thereafter be made from the terms as they were served, treated and considered as separate and independent terms of imprisonment, as, but for the comprehensive language in the original section, they would otherwise, in law, undoubtedly be.

If this were not the intention of the legislature, it cannot well be perceived why, in the amendment and the subsequent act of 1889, such a radical difference in language was used than was employed in particularly defining the basis of commutation in the original section, particularly when we consider that the meaning of the language in that section had already received judicial construction immediately preceding the amendment, by the decision in the Dalton case, and its meaning as there employed placed beyond question.

If the legislature had intended that the same basis for commutation should obtain under the amendments as under the original section, it would not have departed from the plain and judicially construed language used in that section, and have provided for credit commutations from "his term" instead of from the "entire term . . . to which he has been sentenced."

It is clear that under the language of the original section it was intended to make the successive periods of imprisonment under cumulative sentences continuous for commutation purposes, and it is equally apparent by the subsequent amendment, and also under the present act, that it was intended to leave the terms, as the law leaves them, separate. If the provision of the act of 1889 had been inserted in the original section, instead of the language there employed, there

would be no room for contending that a prisoner's terms on cumulative sentences meant for commutation purposes the "entire term" of imprisonment to which he had been sentenced, because, in the absence of any language limiting or qualifying the use of the word "term," it must be given its legal significance, and, so given, each period of sentence prescribed under cumulative sentences is legally separate and distinct from the other, and there is nothing in common between them upon which such a contention could be sustained. The judicial records upon which such cumulative sentences are based are themselves separate and distinct; the offenses are different, and the convictions and judgments are distinct; the terms of imprisonment thereunder may be different in point of duration, as they are certainly separate in point of commencement, and are enforced under separate commitments; the term of each successive imprisonment commencing at the expiration of the prior term.

It was this legal separateness and distinctness between terms of imprisonment under cumulative sentences which the legislature in the original section intended, for the purpose of credit commutation to destroy, and which in clear and comprehensive language it effected, by making the "penal servitude to which a convict has been sentenced" an "entire term." When, however, in subsequently dealing with the subject it abandoned the definition of an "entire term," which it had theretofore created, and used simply the words "his term" it certainly intended that the word "term" should be employed in its legal significance, and to embrace the period solely which a prisoner was actually serving under a given sentence, treated as separate and distinct from any other sentence which, under an equally separate judgment, he would on its expiration be required to serve.

It is insisted by petitioner that his "entire term" and his "term" mean the same thing. Considered with relation to their places in the act of the legislature under discussion, we do not think so. In the original section it is the period to which the convict "has been sentenced," whether it be one term, or successive terms, which shall be treated as an entirety for commutation purposes, and is so defined by the legislature in that section. In the act of 1889 "his term," used without any words of further definition or qualification, in law,

means the term he is actually serving under a particular sentence, and considered as legally distinct from any other to which he has been sentenced, or which he may be required to subsequently serve under an independent and separate judgment of imprisonment.

Our conclusion, therefore, is, that when cumulative sentences are imposed, a prisoner is entitled to commutation credits for good behavior upon each term only as it is served, and not upon the separate terms to which he may have been sentenced treated as a continuous period of imprisonment, or as an entire term under the original section of the Penal Code as construed in the Dalton case.

The prisoner is remanded to the custody of the warden.

McFarland, J., Shaw, J., Angellotti, J., Van Dyke, J., Henshaw, J., and Beatty, C. J., concurred.

[Crim. No. 1178. Department Two.—October 29, 1904.]

THE PEOPLE, Appellant, v. SING LEE, Respondent.

CRIMINAL LAW—RECEIVING STOLEN GOODS—MISCONDUCT OF DISTRICT ATTORNEY—STATEMENT OF OFFENSE NOT PROVED—ORDER GRANTING NEW TRIAL.—Where the defendant was convicted of the crime of receiving certain stolen goods a new trial was properly granted on the ground of misconduct of the district attorney in telling the jury in effect that the defendant was guilty of another offense—viz., the keeping of a place for the habitual reception of stolen goods—which was not proved in the case, and only rested on excluded evidence of the sale of other goods.

ID.—IMPROPER REFUSAL OF INSTRUCTION—DISALLOWED EVIDENCE.—It was error for the court to refuse a requested instruction to the jury not to consider any proposed evidence which has been offered and disallowed by the court.

APPEAL from an order of the Superior Court of Merced County granting a new trial. E. N. Rector, Judge.

The facts are stated in the opinion.

U. S. Webb, Attorney-General, E. H. Hoar, District Attorney, and B. F. Fowler, Deputy District Attorney, for Appellant.

E. R. Jones, and B. Berry, for Respondent.

SMITH, C.—The defendant was found guilty by a jury of the crime of receiving stolen goods, as defined in the statute. The appeal is by the people from an order granting the defendant a new trial. The grounds of the ruling were:—

“That there was a misconduct on the part of the district attorney in asking the defendant when a witness in his own behalf upon cross-examination of said defendant the following question:

“Q. ‘During last November, were you offering for sale across the track a roll of silk?’

“And thereafter arguing to the jury that the defendant was a *fence-keeper*, and that such misconduct was prejudicial to the substantial rights of the defendant, and by reason of such misconduct a fair and impartial trial was not had.”

Objection was made to the question on various grounds; and upon the statement of the district attorney that he had no evidence that the property referred to was stolen—unless it could be drawn out of the witness—the question was ruled out. In the passages in the argument of the district attorney referred to in the order, the defendant was alluded to as a “*fence-keeper*,” or “*criminal fence-keeper*”; and following the use of the expressions “hole in the wall” and “*fence*,” the jury were told that it was believed by the people “that the evidence shows that the defendant in this case is keeping just that sort of a joint.”

The case, we think, is similar in principle to that of *People v. Valliere*, 127 Cal. 66, where the judgment and order denying the defendant a new trial were reversed for language of the district attorney to the jury substantially similar to the language used here. In that case, the defendant being on trial for larceny, the district attorney told the jury, in effect, that there was another theft committed by the defendant “that [he knew] of his own knowledge.” Here the jury was told by the district attorney, in effect, that he believed the evidence showed that the defendant was keeping a place for the habitual reception of stolen goods. This—though the contrary is urged—was something quite different from the charge on which the defendant was tried; and it may be said of it, as was said in the former case, that the statement made “was

in the nature of evidence. It was the assertion of a damaging fact not only not proven, but in regard to matters that had been expressly ruled out." We are of the opinion, therefore, that this is not a case in which the discretion of the lower court in granting a new trial should be interfered with. Also, we think, the eighth instruction asked by the defendant should have been given; and especially that part of it instructing the jury not to consider "any proposed evidence which has been offered and disallowed by the court."

We advise that the order appealed from be affirmed.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

McFarland, J., Lorigan, J., Henshaw, J.

[S. F. No. 3051. Department Two.—October 29, 1904.]

GERMAN SAVINGS AND LOAN SOCIETY, Respondent,
v. ADELINE F. COLLINS et al., Appellants.

ACTION OF QUIA TIMET—ORDERS REPUDIATED AS FORGERIES—FINDING AS TO GENUINENESS—REVIEW UPON APPEAL.—In an action of *quia timet* to determine the liability of the defendants upon orders drawn upon the plaintiff corporation and paid by it, which purported to be signed by the superintendent of the defendants, and which the defendants repudiated as forgeries, where the court found that the checks were genuine, and were authorized by the defendants, such finding is conclusive, where no motion for a new trial was made and the appeal was taken more than sixty days after the entry of the judgment.

ID.—UNFAIRNESS IN TAKING DEPOSITION—ERROR WITHOUT INJURY.—Alleged unfairness to appellants in the taking of the deposition of their defaulting bookkeeper, who obtained the money upon the order in question, consisting of his refusal, upon the advice of counsel, to answer certain questions upon cross-examination, and alleged error in admitting the deposition, cannot be injurious error, where the testimony of the witness related only to his disposition of the moneys received by him, and not to the genuineness of the orders, and it is manifest that if the deposition had been excluded, and

any finding thereon eliminated, the judgment must be the same upon the conclusive finding as to the genuineness and authorization of the orders.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion.

James A. Stephens, John H. Durst, and Curtis Hillyer, for Appellants.

W. S. Goodfellow, and Goodfellow & Eells, for Respondent.

GRAY, C.—The defendants are copartners doing a draying business in San Francisco. H. F. Grinnell has been at all the times herein mentioned the general manager and superintendent of said defendants. William P. Bullard had been their bookkeeper, became a defaulter, and was discharged by them in December, 1896, and after the deposition hereinafter mentioned was taken committed suicide. During the year 1896 defendants had an account with plaintiff standing in the name of H. F. Grinnell, superintendent; and in that year Bullard presented to the plaintiff three orders for fifteen hundred dollars, five hundred dollars, and five hundred dollars respectively, all purporting to be signed by "H. F. Grinnell, Supt." Upon these several orders plaintiff paid to Bullard amounts aggregating twenty-five hundred dollars. The defendants subsequently notified the plaintiff that the said orders were forgeries, and repudiated the same. This action is brought under the provisions of section 1050 of the Code of Civil Procedure by plaintiff, and is in the nature of an action of *quia timet* to determine the claim and liabilities of the parties as to the twenty-five hundred dollars drawn out by the bookkeeper. The court found, among other things: "That each of the said checks or written orders was valid and executed, made and signed by H. F. Grinnell, superintendent, and by and with the authority of defendants."

The court further finds that fifteen hundred dollars paid by plaintiffs on one of said checks was on the same day deposited to the credit of defendants with the Crocker-Woolworth Bank, and was received by defendants and retained to their own use. The court also finds that the amounts

as paid were entered in defendants' pass-book and thereafter said pass-book was returned to defendants and retained by them, so as to constitute an account stated between the parties, etc.

Upon these findings judgment was entered in favor of plaintiff, and the defendants appeal from said judgment. No motion for a new trial was made, and the appeal is taken more than sixty days after the entry of judgment.

The appellants urge as their sole ground for reversal that the court erred in admitting in evidence the deposition of Bullard, for the reason that the taking of said deposition was not in all respects fair. The unfairness complained of consisted in the refusal of the witness, on advice of counsel, to answer certain questions on cross-examination. It is needless, however, to enter upon any inquiry as to this matter of unfairness. The testimony of the witness in the deposition related only to the disposition of the moneys obtained by him upon the three orders in question. It contained no evidence whatever upon the subject of the genuineness of the orders or checks. If the deposition, together with the findings in regard to what disposition Bullard made of the money that he obtained on the orders, was eliminated from the case altogether, the judgment would still find ample support in the finding that the checks were genuine. This finding is not, and cannot be, questioned on the record before us. It is plainly apparent, therefore, that the appellants were not injured by the alleged error.

We advise that the judgment be affirmed.

Cooper, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. McFarland, J., Lorigan, J., Henshaw, J.

[L. A. No. 1577. Department Two.—October 29, 1904.]

MABEL I. HUMISTON, Respondent, v. EUGENE E. SHAF-
FER, Auditor of San Diego County, Appellant.

COUNTY GOVERNMENT ACT—OFFICE OF DISTRICT ATTORNEY—SERVICES OF
STENOGRAPHER NOT A CLAIM AGAINST COUNTY.—The County Gov-
ernment Act of 1897, defining the duties and fixing the compensa-
tion of district attorneys, and making it in full for all services of
every kind, and of every deputy and assistant not otherwise pro-
vided for in the act, makes the district attorney responsible for
the services of a stenographer employed by him to write letters,
pleadings, and judgments, and such services cannot be allowed as
a legal claim against the county. The traveling and other expenses
allowed to the district attorney under section 228 of the County
Government Act do not include such service of a stenographer.

APPEAL from a judgment of the Superior Court of San
Diego County. N. H. Conklin, Judge.

The facts are stated in the opinion.

Sam F. Smith, and Collier & Smith, for Appellant,

Eugene Daney, for Respondent.

COOPER, C.—The plaintiff was employed in the office of
the district attorney of the county of San Diego during the
month of January, 1904, and did certain typewriting for
the district attorney during said month, from the second to
the twenty-ninth days inclusive. She presented a claim
against the county, duly itemized and verified, showing the
total amount of the claim to be \$49.30. The claim consisted of
one hundred different items performed by plaintiff for the
district attorney as stenographer and typewriter, the work
being in connection with the official duties of the district
attorney, and consisted in writing letters to various parties,
letters advising certain county officers as to the correct per-
formance of their official duties, letters of advice to the county
board of supervisors, the writing of pleadings and judgments
in civil actions in behalf of the county, and in writing and
copying criminal informations. The claim was allowed by
the board of supervisors of the county.

The defendant, as county auditor, refused to draw his war-

rant for the amount, and the court below, having heard the facts, ordered judgment for plaintiff awarding her a writ of mandate against defendant, commanding him as county auditor to draw a warrant in favor of plaintiff for the amount. This appeal is from the judgment. The question presented is as to whether the claim is a legal charge against the county. The duties of the district attorney are defined in sections 132 and 133 of the County Government Act of 1897. He must draw all indictments and informations, attend to the prosecution of all persons charged with crime, defend all suits brought in his county or wherever brought, prosecute all recognizances forfeited in the courts of record and all actions for the recovery of debts, fines, penalties, and forfeitures, accruing to the state or his county. He must give when required, without fee, his opinion in writing to county, district, and township officers on matters relating to the duties of their respective offices. He is the legal adviser of the board of supervisors, and must attend their meetings when required and oppose all claims and accounts against the county when he deems them unjust or illegal. Except for his own services, he must not present any claim, account, or demand for allowance against the county. It is provided in section 215 of the same act: "The salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers herein named, either as officers or *ex officio* officers, their deputies and assistants, unless in this act otherwise provided, and all deputies employed shall be paid by their principals out of the salaries hereinbefore provided, unless in this act otherwise provided." It is evident that the above-quoted provisions do not allow the district attorney to claim any extra compensation for his services, or for the services of any deputy or assistant. If the law allows a deputy or assistant, and fixes the salary, then, and not otherwise, can the deputy or assistant be paid by the county. Plaintiff relies upon the section 228, which makes "the traveling and other personal expenses of the district attorney, incurred in criminal cases arising in the county, and in civil actions and proceedings in which the county is interested, and all other expenses necessarily incurred by him in the detection of crime and prosecution of criminal cases, and in civil actions and proceedings and all other matters in which

the county is interested" a county charge. The above-quoted language does not include charges of the kind claimed by plaintiff in this case. The district attorney must write his own letters or pay some one to write them for him, in the absence of any law authorizing the paying of a deputy or assistant. If he could make the cost of copying or writing letters and opinions a personal expense within the meaning of the section, he could on the same principle make the cost of employing an attorney to look up authorities and write briefs a personal expense. He could on the same principle incur personal expense by hiring everything done in connection with his office. His food, clothing, cigars, and amusements are personal expenses, but not such as contemplated by the statute. The statute contemplates expenses necessarily incurred in connection with the office of the district attorney outside of the performance of the duties required of him by statute. If money has to be paid for taking a deposition, for the services of an expert, or for detective work the statute makes it a charge against the county.

In *Dougherty v. Austin*, 94 Cal. 601, it was held that an order of the board of supervisors of Marin County allowing a county clerk a deputy at a salary of fifty dollars a month, to be paid by the county, was an increase of the compensation of the county clerk after his election, and therefore void, as being in conflict with section 9 of article XI of the constitution. In the concurring opinion of the chief justice it was said: "The sum allowed to any given officer being a lump sum out of which he must pay for the services of all deputies and assistants necessary for the prompt and faithful discharge of all the duties of the office, it is evident that his own compensation consists of the residue remaining after payment of such deputies and assistants; and it is equally evident that just so far as the county assumes the payment of such deputies and assistants, such residue is enlarged and the compensation increased." Applying the principles of that case to the case at bar, it is plain that the board of supervisors could not have made an order appointing the plaintiff stenographer and typewriter for the district attorney at a salary. If they could not do it directly, they could not do it indirectly; but if we allow the plaintiff to recover in this case, the result is the same as though she had been appointed by the board of supervisors

and her salary fixed. She would in such case be paid for her month's work by the county. If it could be done for one month, it could be done for every other month in the year. If such allowance could be made to a typewriter, it could on the same principle be allowed to a clerk or an attorney employed by the district attorney. The case of *Dougherty v. Austin*, 94 Cal. 601, has been universally followed by this court. It was applied in *County of Orange v. Harris*, 97 Cal. 600, where it was held that the tax-collector was not entitled to a portion of the penalties collected on delinquent taxes for preparing the delinquent list. It was applied in *County of Kern v. Fay*, 131 Cal. 547, where it was held that the district attorney could not retain in addition to his salary the sum of ten dollars each in sixty-three suits recovered as costs, under a statute, as attorney's fees in actions to foreclose certificates of purchase to state school lands; and in *County of Humboldt v. Stern*, 136 Cal. 63, where it was held that the county clerk of Humboldt County could not receive extra compensation for extra work done by him in preparing data for a claim of the county against the state; and in *Matter of Dodge*, 135 Cal. 512, where it was held that the assessor of the city and county of San Francisco was not entitled to receive for his own use a percentage of poll-taxes fixed by section 3862 of the Political Code. It was applied in *Agard v. Shaffer*, 141 Cal. 725, where it was held that the county recorder of San Diego County was not entitled to extra pay for a clerical force employed to make abstracts of mortgages, deeds of trust, and contracts for the use of the assessor under section 3678 of the Political Code directing the board of supervisors when necessary to provide for such extra clerical force. It was there said: "In the statute before us in this case the compensation was to be allowed by the board to additional clerical force to assist the recorder in performing his official duties. In principle there is no difference between helping out the recorder's compensation by furnishing him a deputy to perform the work of the office and furnishing him a 'clerical force' to do the same thing. The one affects his compensation in exactly the same manner as the other. And if the power to do the one thing should not be delegated to the board of supervisors, then the power to do the other thing should not be so delegated."

The judgment should be reversed and the court below directed to dismiss the proceedings.

Gray, C., and Harrison, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the court below directed to dismiss the proceedings. Henshaw, J., McFarland, J., Lorigan, J.

Hearing in Bank denied.

[L. A. No. 1504. Department Two.—October 29, 1904.]

M. E. C. DE LEONIS, Appellant, v. E. E. WALSH, Administrator, etc., of Laurent Etchepare, Respondent.

DEED INTENDED AS MORTGAGE—ACTION FOR RECONVEYANCE—ACCOUNTING—IMPROPER CREDIT ON FAMILY ALLOWANCE.—Where a widow, pending the administration of the estate of her deceased husband, made a deed of an undivided half of her interest in the estate to one whom she had constituted her general manager, and sued for a reconveyance of the property and for an accounting against his executors for moneys received by him as agent and trustee, where the court found that the deed was intended as a mortgage to the grantee, and an accounting of the indebtedness was had, the court improperly allowed a credit to the executors of money paid by the mortgagee as manager to a grantee of the other half of the widow's interest in the estate of her husband out of the family allowance made to her as widow by the court.

II.—RIGHT OF GRANTEE OF WIDOW—CONTRACT.—The grantee of the widow had no right as such to any part of the family allowance, and a contract by him to use his best endeavors to procure a proper monthly allowance to be made to her out of the estate for her support and maintenance conferred no such right, whether the contract is or is not deemed to refer to a family allowance to be made by the court.

ID.—PAYMENT—IMPROPER DISALLOWANCE.—Where the effect of the pleadings and of the uncontradicted evidence of the plaintiff establishes that she is entitled to a credit in the accounting of a certain sum paid to the mortgagee on account of her indebtedness, a credit for such payment was improperly disallowed.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial. Waldo M. York, Judge

The facts are stated in the opinion.

Dunnigan & Dunnigan, for Appellant.

The burden was on the defendant in possession as trustee, and as agent of the plaintiff, to account for every dollar received or paid to him by plaintiff. (Civ. Code, secs. 2219-2235; Story's Equity, secs. 316, 319; *Kisling v. Shaw*, 33 Cal. 440, 441;¹ *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 87.) The defendant was not entitled to any credit for one thousand dollars paid to plaintiff's grantee on account of the family allowance made by the court to the plaintiff out of the estate of her deceased husband. The grantee in possession as trustee and manager, claiming the property as his own, cannot be allowed for improvements as distinguished from necessary repairs, and cannot charge for fencing ranch. (*Malone v. Roy*, 107 Cal. 522, 523; *Mahony v. Bostwick*, 96 Cal. 56.²) Other items of the account were improperly allowed to Etchepare, and plaintiff was entitled to a reconveyance and to judgment for a balance due in the sum of \$1,994.56.

H. H. Appel, and Horace Bell, for Respondent, filed no brief.

SMITH, C.—This suit was brought to set aside a conveyance of lands from the plaintiff, Mrs. Leonis, to the deceased, Etchepare, of date January 31, 1894; and also for the recovery of money alleged to be due from him, as the general manager of her estate, under her power of attorney of date January 15, 1890. The court found, in effect, that the conveyance in question was made as a mortgage to secure indebtedness due, and to become due, from Mrs. Leonis to Etchepare; and that the latter had expended on her account the sum of \$13,865.43. and received the sum of \$11,421.34—leaving due to him a balance of \$2,444.09. The judgment is, that on payment of that amount to the defendant the land be reconveyed. The plaintiff moved for a new trial, which was denied, and she now appeals from the order. There is no brief on behalf of respondent.

The only questions in the case that need be considered relate to the findings of the court as to several items of the account,

¹ 91 Am. Dec. 644.

² 31 Am. St. Rep. 175.

which it is claimed by appellant are not justified by the evidence; and of these there are at least two as to which, I think, her contention should be sustained. These relate to the credit of one thousand dollars allowed Etchepare for money paid to Bell and White; and the disallowance of a debit to Etchepare of the sum of nine hundred dollars, which Mrs. Leonis claims she paid to him. The item of one thousand dollars paid to Bell and White was half of two thousand dollars of the family allowance received by Etchepare, and was allowed by the referee on the ground that it was due to them under contracts between plaintiff and S. M. White, and White and Bell; by the former of which White was to receive one half the plaintiff's estate; and by the latter Bell one fourth of White's interest.

The former contract, consisting of the deed of Mrs. Leonis and the executory contract of White, is set out in the findings; and it is clear that under its terms White was not entitled to any part of the family allowance, nor does it appear he ever claimed to be. The description in the deed is: "The undivided one half of [her] interest . . . in the estate of Miguel Leonis, and of the property of which he died seized or possessed, the intention being to convey to the party of the second part said interest in that portion of said estate which shall be finally distributed and allotted to the said party of the first part whether such interest be set apart to [her] as community property or otherwise." And in the accompanying contract White agrees "to use [his] best endeavors to procure a proper monthly allowance to be made to [Mrs. Leonis] out of said estate for her support or maintenance during the administration thereof." The family allowance can hardly be regarded as coming within the description of the deed, and were such construction otherwise admissible, it would be negated by the terms of the contract. It is worthy of note that this was all of the family allowance (\$6,595) that was paid to or claimed by Bell and White.

As to the remaining item of nine hundred dollars, it is expressly alleged in the complaint that this was paid by Mrs. Leonis to Etchepare for purposes specified,—that is to say, in part to pay outstanding indebtedness against her, and the balance to be credited on her supposed indebtedness to

him. But this allegation is not denied by the defendant in his amended answer, except as to the number of dollars received; and indeed—except as to the precise amount—the allegation is in effect admitted in the defendant's allegation "that he did not use or receive for his own use any of said moneys," etc. It is also said by the appellant's counsel, and in the absence of contradiction from the respondent it must be taken as true, that Mrs. Leonis's testimony on this point is uncontradicted by that of the defendant or otherwise. Nor have I been able to discover any such contradictory evidence in the record.

Other objections urged by the appellant to the account may be well taken; but as we cannot anticipate that on a new trial the evidence will be the same, it will be as well to leave them undetermined.

I advise that the order appealed from be reversed and the cause remanded for a new trial.

Harrison, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is reversed and the cause remanded for a new trial.

McFarland, J., Henshaw, J., Lorigan, J.

[S. F. No. 2957. Department Two.—October 31, 1904.]

SAMUEL J. EVA et al., Respondents, v. JOHN SYMONS et al., Appellants.

EJECTMENT—TITLE UNDER WILL—VERBAL GIFT FROM TESTATOR—FINDINGS—SUPPORT OF JUDGMENT.—In an action of ejectment, where the plaintiffs derived title under the will of a deceased testator by distribution thereunder, and the defendants by answer and cross-complaint claimed title, possession, and right of possession by verbal gift from the testator, if the findings clearly negative the defendants' claim, and state that plaintiffs are the owners and seized in fee of the land, they are sufficient to support a judgment for the plaintiffs.

Id.—OMISSION IN FINDINGS—APPEAL FROM JUDGMENT—ABSENCE OF EVIDENCE—PRESUMPTION.—Upon appeal from the judgment, without any bill of exceptions showing what evidence was given, the presumption is in favor of the correctness of the judgment, and it

will not be presumed against such correctness that any evidence was given upon an issue as to which there was no finding, and the judgment will not be reversed for failure to find specifically upon issues as to the right of possession and damages.

APPEAL from a judgment of the Superior Court of Contra Costa County. William S. Wells, Judge.

The facts are stated in the opinion.

David E. Marchus, and Charles C. Boynton, for Appellants.

M. C. Chapman, Frederick C. Clift, and R. H. Latimer, for Respondents.

CHIPMAN, C.—Ejectment. Plaintiffs are the heirs at law and devisees of James Eva, deceased, whose last will was duly probated, his estate settled, and final distribution made and the executors discharged. The land in question was distributed to plaintiffs and they bring the action for possession, for damages for withholding possession, and for rents and profits. Defendants denied specifically the averments of the complaint, and claimed to be the equitable owners of the land by virtue of verbal gift of James Eva in his lifetime and possession taken thereunder and ever since retained, the alleged facts appearing in the answer and in a cross-complaint.

In their answer to the cross-complaint plaintiffs deny specifically defendants' allegations relating to the alleged gift of the land to them; admit defendants' possession, but deny that such possession was taken under the alleged agreement by defendants with James Eva, and pray that they, defendants, "have judgment as hereinbefore prayed for and decree that plaintiffs are the owners, seized in fee of all the said premises in said cross-complaint described," and that defendants have no title to or interest in the land.

The findings of fact set forth that the cause came on regularly to be tried "upon the complaint of plaintiffs theretofore filed herein, and upon the answer and cross-complaint of the defendants theretofore filed herein. . . . Said cause was by stipulation of the parties in open court heard upon the equitable defense interposed by the defendants herein by their answer and cross-complaint filed herein, and the jury was impaneled to advise the court upon such questions of fact

relating to said equitable defense as might be thereafter submitted to it by the court." The special issue submitted was, Did James Eva give the land to defendants and place them in possession? The jury answered "Yes," but the court disregarded the verdict and made findings against defendants. The court also found that James Eva took the title to the land in his own name, but did not promise that he would then or thereafter convey the same to defendants, and that he never did convey the title to them or either of them; that plaintiffs claim as devisees of said James Eva, deceased, and "plaintiffs are the owners of said real property, and are seized in fee of the legal title thereto and the whole thereof." As conclusions of law, the court found that defendants are not the owners of the land nor seized in fee of all or any part thereof, and that plaintiffs are the owners and seized in fee of the whole thereof; that defendants are not entitled to judgment on their equitable defense interposed by their answer and cross-complaint, but that plaintiffs are entitled to judgment thereon. Judgment passed for plaintiffs, adjudging that "plaintiffs are the owners seized in fee of said lands and premises and the whole thereof; that defendants are not entitled to judgment upon their equitable defense interposed in this action, but that plaintiffs are entitled to judgment" thereon. Defendants appeal from the judgment on the judgment-roll alone.

The points made by appellants are, that there is neither finding of fact nor judgment determining the issue of right of possession or of damages, and the court therefore failed to find on a material issue (citing *O'Brien v. O'Brien*, 124 Cal. 422); and that there can be but one final judgment, and a judgment which determines "as to one or a portion of the issues only is premature and contrary to the course of law." (Citing *Fox v. Hale & Norcross S. M. Co.*, 112 Cal. 568; *White v. White*, 130 Cal. 597,¹ and other cases.)

So far as any right asserted by defendants is concerned, the court made complete findings against defendants. They claimed the title and possession and right of possession upon an alleged verbal gift, and not otherwise. The findings and judgment clearly negative these issues. The court further found, and also adjudged, that plaintiffs are the owners and

¹ 80 Am. St. Rep. 150.

seized in fee of the land. The findings are sufficient to support the judgment, and contain nothing inconsistent with it. The cause is here on the judgment-roll alone. It will not be presumed against the correctness of the judgment that there was evidence upon a point in respect to which there is no finding. In *Wise v. Burton*, 73 Cal. 175, the rule was stated as follows: "This court will not reverse for want of a finding on an issue, where there is no evidence in relation to such issue." (See *Himmelman v. Henry*, 84 Cal. 104; *Gregory v. Gregory*, 102 Cal. 52.) In the recent case of *Kaiser v. Dalto*, 140 Cal. 167, the court said: "It is also settled that the failure to find upon an issue will not be ground for reversing a judgment otherwise correct, unless it appears by statement or bill of exceptions that evidence was given upon such issue."

Whether plaintiffs have by the judgment obtained all the relief to which they are entitled or are seeking, or can in this action have further relief, are questions which do not now concern us. It is clear that under the rule above stated appellants are not entitled to have the judgment reversed, and we therefore advise that it be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. McFarland, J., Lorigan, J., Henshaw, J.

[S. F. No. 2938. Department Two.—October 31, 1904.]

W. W. MONTAGUE & CO., Respondent, v. JOHN FURNESS et al., Appellants.

BUILDING CONTRACT—VOID BOND OF CONTRACTOR—UNCONSTITUTIONAL SECTION OF CODE.—Section 1203 of the Code of Civil Procedure is unconstitutional, and a bond given in pursuance of it under a building contract is void, and cannot be upheld as a common-law obligation.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Thomas F. Graham, Judge.

The facts are stated in the opinion.

Alexander G. Eells, for Appellants.

W. H. Linforth, for Respondent.

GRAY, C.—This action is brought against a building contractor and his sureties upon a bond alleged in the complaint to have been “given under and in pursuance of the provisions of section 1203 of the Code of Civil Procedure of this state.” Plaintiff seeks to recover the amount due it from the contractor, Furness, for certain materials furnished by plaintiff for use in constructing the building to which the bond relates. The plaintiff had judgment against all the defendants, and the sureties on the bond appeal from said judgment.

The said section 1203 of the Code of Civil Procedure is unconstitutional, and the bond having been given in pursuance of it cannot be upheld even as a common-law obligation, and is void. Therefore, the sureties on it were not liable. It was so held in the two recent cases of *San Francisco Lumber Co. v. Bibb*, 139 Cal. 193, and a case of the same title, 139 Cal. 325. In both of these cases the action was upon the identical bond sued on here, by parties furnishing material just as in this case. The decisions in those cases dispose of the only question that need be decided on this appeal—to wit, the constitutionality or unconstitutionality of said section 1203 of the Code of Civil Procedure. Nothing need be here added to what is said in those cases.

We advise that the judgment be reversed.

Cooper, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is reversed.

McFarland, J., Lorigan, J., Henshaw, J.

[S. F. No. 3111. Department Two.—October 31, 1904.]

ERWIN M. COOPER, Executor of John H. Lochhead, Deceased, Appellant, v. **SPRING VALLEY WATER WORKS**, Respondent.

ORDER GRANTING NEW TRIAL—INSUFFICIENCY OF EVIDENCE—SUPPORT OF GENERAL ORDER.—Where the motion for a new trial was upon all of the statutory grounds, a general order granting a new trial which can be supported on the ground of the insufficiency of the evidence to sustain the verdict will not be disturbed upon appeal.

ID.—VERDICT AGAINST WEIGHT OF EVIDENCE—CONFLICT—DISCRETION OF JUDGE—REVIEW UPON APPEAL.—The judge of the trial court has discretion to grant a new trial on the ground that the verdict is against the weight of the evidence, notwithstanding a conflict therein, and its order granting the same will not be disturbed where no abuse of discretion appears.

ID.—ACTION FOR CONVERSION OF STOCK—INDORSEMENT—CONSIDERATION—PLEDGE—NEW TRIAL PROPERLY GRANTED.—In an action by an executor against the corporation defendant for conversion of stock belonging to the testator, where the evidence showed that it was regularly indorsed in his handwriting, and was transferred by the holder to a bank as security for money borrowed, and the verdict was for the plaintiff on the ground that the shares were wrongfully taken by the holder, who directly testified that the stock was indorsed and delivered to him by the testator in payment for professional services, the court properly granted a new trial, notwithstanding conflicting evidence that such services were gratuitously given.

ID.—IMPROPER ADMISSION OF NEGATIVE TESTIMONY.—In such action the court improperly admitted testimony that the deceased had never told certain witnesses that he had transferred the stock, and that the physician never told the witnesses that the stock had been transferred to him. They were not called upon to speak thereof to third persons.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a new trial. **Frank J. Murasky**, Judge.

The facts are stated in the opinion of the court.

W. C. Sharpstein, for Appellant.

M. B. Kellogg, for Respondent.

McFARLAND, J.—This is an action brought by plaintiff as executor of the last will of John H. Lochhead, deceased, to recover of the defendant the value of forty shares of its capital stock alleged to have been wrongfully converted by defendant. The jury returned a verdict for plaintiff in the sum of \$4,080 with interest. Defendant made a motion for a new trial, which was granted; from the order granting the motion plaintiff appeals.

The motion for a new trial was made on all the statutory grounds, and the court did not intimate what ground the order granting the motion was based on; and unless the order cannot be maintained upon any one of the grounds of the motion it must be affirmed; and assuming that it was granted for insufficiency of the evidence to support the verdict there is no reason for disturbing it. In the matter of *In re Carriger*, 104 Cal. 81, this court said as follows: "When the judge of a trial court is satisfied that a verdict is not warranted by the evidence he should set it aside; and when he does so his order granting a new trial will not be reversed unless it appears to this court that he had no reasonable and just ground for holding that the verdict was against the weight of the evidence. The mere fact that there is some conflicting evidence on the points at issue does not preclude him from exercising the supervisory power of granting a new trial which is clearly given him." (Citing cases.) This language is directly applicable to the case at bar.

It is averred in the complaint that the deceased died on the 4th of May, 1899, and that at the time of his death he "was lawfully possessed of forty shares of the capital stock of the defendant designated on the books of defendant as certificate No. 20,484." But the undisputed facts are, that at the time of his death this certificate of stock, regularly indorsed in the handwriting of deceased, was in the possession of Dr. George M. Terrill, who afterwards transferred it to the First National Bank of San Francisco as security for money loaned him by the bank, with authority to have the stock transferred to the bank; and the respondent afterwards took up the old certificate and issued a new one for the said forty shares to the said bank. The issue in the case, as asserted by appellant at the time of the trial and presented to the jury by the court's instructions, which were not objected to and to which

no exception was taken, was whether Dr. Terrill was the lawful owner of the said stock or whether he had obtained possession of it wrongfully. In the opening statement to the jury, counsel for appellant said that plaintiff would introduce evidence tending to show "that this stock was taken by Dr. Terrill from Dr. Lochhead's possession without Dr. Lochhead's knowledge or consent; in other words, that it was stolen." The court instructed the jury that "If you believe that George M. Terrill was in possession of this certificate indorsed and had such possession before the death of Dr. Lochhead without stealing or finding the same, the court instructs you that there is no evidence that such possession was not rightful, and the presumption is that it was rightful, and if there was an understanding between Terrill and Lochhead that Terrill owned the certificate, or was authorized to pledge it for his own benefit, then the assignment thereof by Terrill to the First National Bank was lawful as a pledge, and the defendant should receive a verdict at your hands,"—and further, "The court instructs you that in order to establish the theft of the stock by Terrill, the plaintiff must produce satisfactory evidence of grand larceny." Now, about the only direct evidence as to this issue was the testimony of Dr. Terrill. We will not undertake to give his testimony, in full, but will notice enough of it to show its general character. He testified that he was a physician and surgeon and attended the deceased professionally for about eight or nine years previous to his death; that during the two years, or a year and a half, before his death "he had organic trouble called angina pectoris, a disease of the heart, suffering from severe spasmodic pains in the heart; this disease depresses the system and is a dangerous disease; I had to remain sometimes three or four hours at a time with him, he did not want me to go away; I relieved his pains and he did not want me to leave him; he finally died of this disease. . . . In fact, I gave up my vacation for the summer, he begged me not to go away." He further testified that in January, 1899, the deceased indorsed the certificate of stock and delivered it to him in payment of his professional services, the deceased reserving the right to have the dividends thereon during his lifetime, which were paid to him until his death, and that before that time "Dr. Lochhead ~~and~~ spoken to me repeatedly

about my services and compensating me for the same." There was some conflicting evidence, consisting mainly of testimony of witnesses of declarations of Dr. Terrill tending to show that he was giving his services to the deceased gratuitously; but considering the direct testimony of Dr. Terrill, the undisputed fact that he was in possession of the certificate regularly indorsed, together with the other evidence in the case, there is no warrant whatever for here holding that the court below abused its discretion in granting the new trial. Therefore, the order appealed from must be affirmed.

We do not deem it necessary to notice the various other points made by respondent. Many of them are not of any very great importance and may not arise again. It is proper to say, however, that the court should have ruled out the testimony offered by appellant that the deceased had never told certain witnesses that he had transferred the stock and that Dr. Terrill had never told the witnesses that the stock had been transferred to him. We see no relevancy or pertinency in this testimony. People are not called upon to speak of such transactions to third persons, and usually do not.

The order appealed from is affirmed.

Henshaw, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[S. F. No. 3049. Department Two.—November 1, 1904.]

STEPHEN H. RISDON, Respondent, v. ENOCH YATES,
Appellant.

ASSAULT AND BATTERY—CIVIL ACTION—AMENDED ANSWER—SELF-DEFENSE—ORDER STRIKING OUT—CURE OF ERROR—ALLOWANCE UPON REQUEST BEFORE JURY—PRESUMPTIONS.—In a civil action for damages for an assault and battery, where the defendant, without leave of court, filed an amended answer setting up a plea of self-defense, which was stricken out on motion on the day of trial, but was allowed to be filed on request made before the jury, any error in striking out the answer was cured by such request; and it cannot be held that the defendant was injured in the eyes of the jury

by having to make such request before them, but it must be presumed that the jury did their duty and decided the question of fact under the instructions of the court upon the pleadings as they then were.

ID. — EVIDENCE — PLEA OF GUILTY IN CRIMINAL CASE — ADMISSION — QUALIFYING DECLARATION EXCLUDED — PREJUDICIAL ERROR.—A plea of guilty in a criminal case in regard to the same assault and battery is not conclusive, and does not estop the defendant in a civil action therefor. It has merely the effect of an oral admission, and is governed by the rules applicable thereto. Where the plea of guilty was introduced by the plaintiff from the justice's docket, it was prejudicial to refuse to allow evidence of all that was said by the defendant when he made the plea qualifying the admission, where the evidence was sharply conflicting as to whether the plaintiff was or was not the aggressor in striking the first blow.

ID. — AMENDMENT TO OBTAIN OBJECTION TO EVIDENCE — OFFER NOT RENEWED — ESTOPPEL.—Where an amendment was allowed upon defendant's request to obviate an objection to evidence bearing on the question of who was the first aggressor, the offer of which was not renewed after the amendment, he cannot be permitted to ask this court to review the original ruling.

ID. — INAPPLICABLE INSTRUCTIONS.—Instructions, though abstractly correct, should not be given if they are inapplicable to the evidence and may mislead the jury.

APPEAL from a judgment of the Superior Court of Napa County. S. K. Dougherty, Judge.

The facts are stated in the opinion.

F. E. Johnston, H. L. Johnston, and L. E. Johnston, for Appellant.

T. B. Hutchinson, for Respondent.

COOPER, C.—This action was brought to recover damages for an assault and battery committed upon plaintiff by defendant. The jury returned a verdict for plaintiff, upon which judgment was duly entered. Defendant prosecutes this appeal from the judgment on the judgment-roll and a bill of exceptions. The bill of exceptions shows that the evidence was conflicting, and it is conceded that there is sufficient evidence to sustain the verdict. Several errors are claimed as to rulings of the court and in giving instructions. This discussion will be confined only to the matters deemed material.

More than ten days after the defendant had served his

original answer, and on the day set for trial, the defendant filed with the clerk and served upon plaintiff's attorney an amended answer, in which he set forth affirmatively an additional defense, that the alleged assault and battery was committed in self-defense. After the case was called for trial and the jury impaneled, the court, on motion of plaintiff's attorney, made an order striking the amended answer from the files, upon the ground that it had been filed without permission of the court.

Defendant contends that he had the right under section 472 of the Code of Civil Procedure to amend his answer once of course without permission of the court. It is not necessary to decide the question as to the ruling in striking out the answer. If any error was committed, it was cured by the court upon defendant's request making an order permitting the amended answer to be filed. It was filed, the case was tried upon the issues raised by it, and it is now in the record. We cannot hold, as contended by defendant, that the fact of defendant having to ask the court in the presence of the jury for leave to file his amended answer injured his case in the eyes of the jury. The jurors are not supposed to know or interest themselves with questions of law raised before the court during the trial. If every ruling made by the court in the presence and hearing of the jury could be investigated as to whether or not it might possibly have injured the rights of one of the parties, and thus be made the ground for reversing a case, there would be few verdicts that would stand. We must presume that the jury did its duty and decided the question of fact under the instructions of the court upon the pleadings as they are. Verdicts are not to be set aside for light, trivial, or imaginary errors.

The plaintiff called one Palmer, a justice of the peace, for the purpose of identifying the record in a criminal case of the People v. Defendant herein, and introduced the complaint in the criminal action and the docket of the justice showing that defendant had pleaded guilty and suffered a fine for the same assault and battery for which damages were recovered in this action. Defendant ~~ought~~ by cross-examination of the ~~witness~~ and by his own testimony to prove the entire statement made to the justice at the time defendant pleaded guilty concerning such plea and the reasons why defendant

made it. In other words, defendant sought by several questions to prove the entire statement in connection with the oral plea, as made to the justice at the time and entered in his docket. The court sustained the objections of plaintiff to each of the questions by which it was sought to elicit the full statement. In this the court erred. The evidence was sharply conflicting, the defendant introducing evidence which if true shows that plaintiff was the aggressor and struck the first blow, while the plaintiff introduced evidence which if true shows that the defendant, without provocation, willfully assaulted and beat him. It was thus for the jury to determine where the truth lay, and they were to do this from seeing and hearing the witnesses and from all the competent facts and circumstances in the case. Now, the record of the plea of guilty and judgment of conviction in the justice court was not conclusive, and did not estop the defendant in the civil case. If defendant had been acquitted in the justice court on a plea of "Not guilty" he would not have been permitted to introduce the record or prove such fact in this case as a bar. This for the reason that the criminal proceeding was by the state, and this plaintiff was not a party to it. Therefore, the judgment in a criminal suit cannot be used in a civil action to establish the facts on which such judgment rests. But where a defendant has pleaded guilty in a criminal case the plea and judgment are received in evidence as an admission, but not as conclusive. "It is therefore to be treated according to the principles governing admissions, to which class of evidence it properly belongs." (1 Greenleaf on Evidence, 16th ed., sec. 527a.) If an admission is testified to by a witness against a party, such party has the right in cross-examination to bring out the whole of what was said in direct connection with and pertaining to the admission. In this case the plaintiff was in effect allowed to prove that defendant said or admitted that he was guilty of an assault and battery upon plaintiff. This admission may have turned the scale and caused the jury to disregard all the defendant's testimony. The plaintiff was allowed to put in evidence the part of the conversation or declaration to the justice which in law amounted to an admission. The defendant was not allowed to show that he stated other facts at the time which showed that it was not an unqualified admission. The state-

ment of defendant in the form of an admission to the justice was allowed for the purpose of corroborating the evidence of plaintiff; the statement of defendant, if such statement was made, that plaintiff struck the first blow, was not allowed to go to the jury. It is certainly evident that this was receiving evidence only on one side of the controversy. The plaintiff was not bound to offer in evidence the admission made before the justice, but having done so the defendant was entitled to the whole of the declaration or admission. The fact that the justice wrote down part of it in his docket makes no difference. It was, after being written in the docket by the justice, but an oral admission of defendant. The entry by the justice was only the conclusion or opinion of the justice as to the effect of what defendant said. The question is, Did the defendant in words admit his guilt before the justice? If he did, what were the words and what did he say? When a part of a declaration or conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other. (Code Civ. Proc., sec. 1854.)

It is said in Greenleaf on Evidence (vol. 1, sec. 201): "We are next to consider the effect of admissions when proved. And here it is to be first observed that the whole admission is to be taken together; for though some part of it may contain matter favorable to the party and the object is only to ascertain that which he has conceded against himself, for it is to this only that the reason for admitting his own declaration applies,—namely, the great probability that they are true; yet, unless the whole is received and considered, the true meaning and import of the part which is good evidence against him cannot be ascertained. . . . But though the whole of what he said at the time and relating to the same subject may be given in evidence, yet it does not follow that all the parts of the statement are to be regarded as equally worthy of credit; but it is for the jury to consider under all the circumstances how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favor as those making against him."

The importance of having all that was said with reference to the subject-matter is well illustrated in Erskine's celebrated argument in Stocksdale's trial (22 How. St. Tr. 257), where he employs Algernon Sidney's famous illustration of

what might be a criminal charge against the publisher of the Bible for printing "(The fool hath said in his heart) there is no God." The words "there is no God" without the context might be selected and the publisher indicted for blasphemy.

In the Queen's case (2 Brod. & B. 287) it was held by the House of Lords that where a few lines of a letter were exhibited to a witness, the cross-examination might bring out the whole of the letter. It was there said that if the whole letter could not be put in evidence "thus the court may never be in possession of the whole, though it may happen that the whole, if produced, may have an effect very different from that which might be produced by a statement of a part."

In *Johnson v. Powers*, 40 Vt. 612, it is said: "The object of the party using such declarations or admissions against the party who made them is only to ascertain that which he conceded against himself, yet, unless the whole is received and considered, the true meaning and import of the part which is in evidence against him cannot be ascertained. It is therefore a rule of evidence that the whole declaration or admission of the party made at one time shall be taken together, but the jury are at liberty to believe a portion and disbelieve the other, as they are of all evidence."

It was said by Abbott, C. J., in 2 Dowl. & R. 361: "It is at all times a dangerous thing to admit a portion only of a conversation in evidence, because one part taken by itself may bear a very different construction and may have a very different tendency to what would be produced if the whole were heard; for one part of a conversation will frequently serve to qualify and explain the other."

The same rule was applied by this court where one party read an extract from testimony of the witness given by him in a previous judicial proceeding, and the court held that the other party might introduce in evidence the whole of such testimony. (*Hobart v. Terrill*, 68 Cal. 12.)

In the later case of *Granite Gold Mine Co. v. Maginness*, 118 Cal. 134, the rule is thus stated: "We think the general rule is well established that an entire admission must be taken together. This is essential to enable the court or jury to judge of the true extent of the admission, which, when taken entire, will often have a different import from that

which a partial account may convey." Our attention is called to the cases of *Root v. Sturdivant*, 70 Iowa, 55, and *Hauser v. Griffiths*, 102 Iowa, 215, which hold the other way, but the reasoning of these cases does not commend them to us. We think they are not in accord with the best-considered cases. Nor can we say the rulings in this case were not prejudicial. It may have been that the admission as shown by the justice's docket was deemed by the jury to be of great weight, and of more force than all the testimony of defendant on the trial.

The defendant was a witness in his own behalf, and he claimed and testified that plaintiff was the aggressor and struck the first blow. He was asked in direct examination what had been the relations between himself and plaintiff up to the time of the alleged assault and battery. Counsel stated that the question was asked for the purpose of showing who was the aggressor. Counsel for plaintiff objected to the question upon the ground that it was irrelevant, incompetent, and not within the pleadings, as no justification had been pleaded. The court sustained the objection, and the ruling is claimed to be erroneous.

The record shows that immediately after the ruling the defendant asked permission of the court "to amend his answer so as to permit the evidence offered to be introduced."

Defendant was granted leave to amend his answer. He did amend it by setting up affirmatively that plaintiff was the aggressor and first assaulted the defendant. He does not appear to have renewed his attempt to get the evidence before the court. The question was not again asked of the witness. Under such circumstances we would not hold the ruling erroneous, conceding the evidence to be competent and material. If the defendant after obtaining leave to amend his answer so as to make the evidence admissible under the views of the trial judge did not take the trouble to renew his offer, he cannot be permitted to ask this court to review the case on the ruling. He took the trouble to place his pleadings in shape to obviate the objection, but does not appear to have deemed the matter of sufficient importance to renew his offer.

Objection is made to several instructions the effect of which was to tell the jury that before a party can use force to eject a trespasser from his lands he must direct the trespasser to

remove, give him sufficient time to do so, and then, if he does not remove, no more force can be used than is reasonably necessary to remove him. These instructions are not objected to as propositions of law, but defendant claims that there is no evidence tending to show that the injuries received by plaintiff were received by him by reason of any attempt on the part of defendant to eject him as a trespasser from the premises.

We find no evidence in the record to which the instructions are applicable. The defendant placed his defense entirely upon the theory that the assault and battery upon plaintiff was done by defendant in self-defense. The instructions may have misled the jury, and should not have been given. While it is not necessary to hold that the instructions of themselves would be sufficient error to justify a reversal of the case, it would be safer not to give them upon a retrial, unless there should be evidence to which they would be applicable.

We advise that the judgment be reversed.

Gray, C., and Harrison, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed.

McFarland, J., Lorigan, J., Henshaw, J.

[S. F. No. 2029. Department Two.—November 2, 1904.]

HOME SECURITY BUILDING AND LOAN ASSOCIATION OF ALAMEDA COUNTY, Respondent, v. WESTERN LAND AND TITLE COMPANY et al., Defendants; B. KELSEY, Appellant.

PARTITION—PLEADING—SUFFICIENCY OF DESCRIPTION—FRIVOLOUS APPEAL—DAMAGES.—Where the description of the property in a complaint in partition is sufficient under the rule in all jurisdictions, and long settled in this state, upon appeal from an interlocutory judgment involving only a demurrer for uncertainty in the description the judgment will be affirmed with damages for a frivolous appeal.

APPEAL from an interlocutory judgment of the Superior Court of Alameda County. John Ellsworth, Judge.

The facts are stated in the opinion.

J. H. Smith, for Appellant.

J. B. Richardson, for Respondent.

COOPER, C.—Defendants filed a demurrer to the complaint, which was for partition, upon the ground, among others, that it “is uncertain in this, that it cannot be determined from the complaint where the property sought to be described in the complaint is situate.”

The demurrer was overruled and an interlocutory judgment entered. Defendant Kelsey prosecutes this appeal from the judgment and claims that the court erred in overruling the demurrer, his sole point being that the complaint does not contain a sufficient description of the property sought to be partitioned.

The description is as follows: “Situate in Oakland Township, county of Alameda, state of California, and described as follows, to wit: The westerly one-half of lot nine (9) in block D as the same is delineated and so designated on a certain plat entitled ‘Map of Klinknerville Tract,’ filed March 21, 1899, in the office of the county recorder of Alameda County, California.”

The description is sufficient under the rule in all jurisdictions and long settled in this state. The judgment should be affirmed, with one hundred dollars damages against appellant for a frivolous appeal.

Gray, C., and Harrison, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed, with one hundred dollars damages against appellant for a frivolous appeal.

McFarland, J., Lorigan, J., Henshaw, J.

[S. F. No. 2832. Department Two.—November 3, 1904.]

WILLIAM GRANT, Appellant, v. W. D. BANNISTER, DAVID HEARFIELD, EDWARD MURPHY, SHERMAN WETMORE, JAMES McCORMICK, B. A. OGDEN, and THE VINE SPRING MINING COMPANY, a Corporation, Respondents.

ORDER CHANGING VENUE—RESIDENCE OF DEFENDANTS—CONVENIENCE OF WITNESSES—PRESUMPTIONS UPON APPEAL—DISCRETION.—All presumptions upon appeal are in favor of an order changing the place of trial. Where the motion was made on the ground that all the defendants save one were residents of the county to which the venue was changed, and that he was not a proper or necessary party to the action, and also on the ground that the convenience of witnesses and the ends of justice would be promoted by the change, supported by affidavits, if it be conceded that such defendant was a proper and necessary party, the order may be supported on the second ground stated in the motion, and it will not be disturbed upon appeal where no abuse of discretion appears.

12.—ACTION TO QUIET TITLE TO STOCK OF CORPORATION—PLACE OF TRANSACTION—RESIDENCE OF WITNESSES—GENERAL AFFIDAVITS IN SUPPORT OF ORDER.—Where the action was brought to quiet title to stock in the corporation defendant having its place of business in the county to which the venue was changed, and the transactions involved in the cause of action and defense took place in that county, and the plaintiff's grantor and all defendants owning stock reside therein, and plaintiff has business relations therein, although both the affidavits for defendants and the counter-affidavits of plaintiff as to the convenience of witnesses were too general, in merely stating their residence without giving their names and the testimony expected from each, and little importance would be attached to defendant's affidavit had the motion been denied, yet where it was granted, taking their affidavits in connection with the pleadings and papers on file, and the same general character of the counter-affidavits, it cannot be said that there was not sufficient basis for the order.

13.—STIPULATION FOR TIME TO PLEAD—MOTION FOR CHANGE OF VENUE.—A stipulation giving to the defendant further time to plead carries with it the right to move for a change of venue at the time of pleading under the statute, notwithstanding the allowing of "additional time to make a motion in said action" was stricken from the stipulation.

APPEAL from an order of the Superior Court of Marin County changing the place of trial. F. M. Angellotti, Judge.

The facts are stated in the opinion of the court.

Mullany, Grant & Cushing, for Appellant.

The affidavits for convenience of witnesses were insufficient in not stating the names or evidence of the witnesses. (*Cook v. Pendergast*, 61 Cal. 77; *Loehr v. Latham*, 15 Cal. 419; *Anonymous*, 6 Cow. 389; *Price v. Fort Edwards Works*, 16 How. Pr. 51; *People v. Hays*, 7 How. Pr. 249; *American Ex. Bank v. Hill*, 22 How. Pr. 29; *Hubbard v. Insurance Co.*, 2 How. Pr. 152.) The right to change the venue was waived. (*Hearne v. De Young*, 111 Cal. 376; Code Civ. Proc., sec. 395.) One of the defendants residing in Marin County was sufficient to defeat the motion on the ground of residence of the defendants. (*Hearne v. De Young*, 111 Cal. 376.)

R. H. Countryman and Ralph C. Harrison, for Respondents.

The motion was properly granted on both grounds. Plaintiff cannot by joining an unnecessary party deprive real defendants who are non-residents of the county from their right to change the venue to the place of their residence. (*Sayward v. Houghton*, 82 Cal. 630; *Brady v. Times-Mirror Co.*, 106 Cal. 56.) In determining the motion the court had the right to consider the pleadings in connection with the motion. (*Lake Shore Cattle Co. v. Modoc L. and L. Co.*, 108 Cal. 261.) The decision of the court on conflicting affidavits will not be reviewed, no abuse of discretion appearing. (*Bowers v. Modoc L. and L. Co.*, 117 Cal. 50; *Hanchett v. Finch*, 47 Cal. 192.) The statutory right to make the motion was not waived by appearance or by stipulation granting time to plead. (Code Civ. Proc., sec. 396; *Fletcher v. Maginis*, 136 Cal. 362.)

COOPER, C.—This action is brought to quiet plaintiff's title to, and have it adjudged that he is the owner of, two hundred and fifty shares of the capital stock of defendant corporation. All the defendants except Hearfield and the corporation are directors of defendant corporation.

Defendants at the time of pleading moved for an order changing the place of trial from the county of Marin, where

the action was commenced, to the county of Tuolumne, upon the grounds,—1. That the county of Marin is not the proper place for the trial of the said action, for the reason that the residence of each of the defendants except Hearfield was at the time the action was commenced, and ever since has been, in Tuolumne County, and that while Hearfield was and is a resident of Marin County, he is not a necessary or proper party defendant, but was made such defendant for the purpose of preventing a change of venue from Marin County; and 2. That the convenience of witnesses and the ends of justice will be promoted by the change. The motion was made and granted upon the pleadings and affidavits filed by the respective parties. This appeal is from the order granting the motion.

If it be conceded that Hearfield was a necessary and proper party, the order may be sustained on the second ground stated in the motion. All presumptions are in favor of the order of the trial court, and unless there is reason to believe that it has abused its discretion this court will not interfere. (*Hanchett v. Finch*, 47 Cal. 192.)

It clearly appears that the transaction out of which plaintiff's cause of action arose, as well as that upon which defendants rely for their defense, took place in the county of Tuolumne. The defendant corporation has its place of business there. McPherson, the person from whom the plaintiff claims to derive his title to the shares of stock, and who is necessarily the important and material witness outside the parties, resides in that county. All the defendants who claim to be the owners of the stock reside in that county, and it is reasonable to suppose that they will either be witnesses or be present at the trial in their own interest. The affidavit of Bannister, which is not denied, states that plaintiff is largely interested in business in Tuolumne County, and that he is often in said county looking after his private affairs.

Appellant contends that the affidavits used by defendants on their motion for a change of venue are insufficient because they contain only a general statement "that all the witnesses in this case who are necessary or material to the trial thereof, except the plaintiff, reside in said Tuolumne County."

The affidavits would have been much more satisfactory if they had contained the names of the witnesses and the testi-

mony expected from each, and if the court below had denied the motion we would attach little importance to such affidavits, had defendants appealed. But the court granted the motion, and we cannot say that the affidavits in connection with the pleadings and the papers on file were not sufficient as a basis for the order. Particularly is this so in face of plaintiff's only affidavit to retain the case in Marin County, which contains only the general statement "that he will have at least four witnesses, all of whom reside either in San Francisco or Santa Rosa, Sonoma County." All parties seem to have relied upon general statements in their affidavits, and we do not think the statements of one any more subject to criticism than the statements of the other in this regard. It is stated and conceded that McPherson is a material witness, and that he resides in Tuolumne County. Where six defendants and the only material witness named reside in the county to which the place of trial is changed, we cannot say that the ends of justice will not be promoted by the order.

It is claimed that the defendants waived their right to move for a change of venue for the reason that they asked plaintiff's attorneys for a written stipulation for thirty days' additional time to plead or move in said action. Plaintiff's attorneys refused to grant further time to defendants' attorneys to move or make a motion, but modified the proposed stipulation by striking from it the words allowing additional time to move or make a motion in said action, thus extending the time to plead only. We can regard only the written stipulation. As modified it extended the time to plead, but was silent as to any time in which to make a motion. The statute gave the defendants the right to make the motion "at the time they appeared and answered or demurred." The stipulation giving further time to plead carried with it the right to move for a change of venue at the time of pleading.

We advise that the order be affirmed.

Gray, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed. McFarland, J., Lorigan, J., Hanshaw, J.

[S. F. No. 2996. Department One.—November 4, 1904.]

ANNA R. WHITE, Respondent, v. MILTON BESSE, Sheriff,
etc., Defendant; JULIUS LEE, Intervener, Appellant.

INJUNCTION—EXECUTION SALE—INTERVENTION BY CREDITOR—COMPLAINT TO CANCEL FRAUDULENT DEEDS—FINDINGS AGAINST INTERVENER—CONSIDERATION IMMATERIAL.—In an action to enjoin the sheriff from selling plaintiff's property on execution against her husband, where the execution creditor, before answering the complaint, filed a complaint in intervention to cancel two deeds from the husband to the plaintiff as having been made without consideration, in contemplation of insolvency, to defraud creditors, and the court found for the plaintiff and against the intervener, that there was no fraudulent intent, and that the transfers were made to indemnify plaintiff as surety for the husband, and that he was not then insolvent, and did not contemplate insolvency, the findings show the validity of the deeds, and, as there was in fact no fraudulent intent, it is immaterial whether there was or was not a sufficient consideration for them.

Id.—FINDINGS—DEED INTENDED AS SECURITY—EXECUTION SALE SUBJECT TO MORTGAGE—COMPLAINT OF INTERVENER LIMITED TO CAUSE OF ACTION ALLEGED.—Under the complaint of the intervener, which was not addressed to the complaint of the plaintiff, and did not purport to answer the same, the intervener, who alone appeals, cannot avail himself of any denial of the complaint by the defendant, who does not appeal, and his averment that plaintiff never was the owner cannot be deemed a denial of plaintiff's averment that she is the owner. The plaintiff must rest solely on the cause of action to set aside the deeds as fraudulent, and cannot change it so as to seek an execution sale subject to a mortgage, by reason of findings that the deeds were intended as security. Such findings as to the intervener must be deemed to apply solely to the consideration for the deeds.

APPEAL from a judgment of the Superior Court of Santa Cruz County. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

Charles M. Cassin, and Charles B. Younger, for Appellant.

H. C. Wyckoff, for Respondent.

SHAW, J.—The complaint states a cause of action against the defendant, Besse, as sheriff of Santa Cruz County, to enjoin him from selling certain land, alleged to be the prop-

erty of the plaintiff, upon an execution issued on a judgment recovered by Lee, the intervener, against Edward White, the husband of the plaintiff. The judgment creditor, Lee, by leave of the court, intervened and filed his complaint in intervention. The court after a trial made its decision and gave judgment in favor of the plaintiff. The intervener alone appeals from the judgment upon the judgment-roll.

The plaintiff alleges, among other things, that she was and ever since February 28, 1898, had been, the owner of the land in question. The intervener's judgment was recovered on September 24, 1898. The defendant, Besse, answered the plaintiff's complaint, specifically denying the allegation of ownership, as well as most of the other allegations thereof. The intervener, however, did not answer the complaint, but contented himself with filing a complaint in intervention, which was answered by the plaintiff. The complaint in intervention alleged the recovery of the judgment against Edward White, set forth that prior thereto Edward White had executed two deeds purporting to convey the property to the plaintiff, dated respectively September 25, 1897, and March 1, 1898; that intervener was then a creditor of Edward White for the claim upon which judgment was afterwards recovered, and alleged that each of said deeds was without consideration, and was made by Edward White while he was insolvent and in contemplation of insolvency, and for the purpose and with the intent to defraud the intervener and other creditors of Edward White; that there was no other property out of which said judgment could be collected; that the fraudulent deeds obstructed the right of the intervener to have the same sold on execution; that said Anna R. White was not then, and never had been, the owner of, or in possession of, the property or any part thereof; that she had no right thereto, or interest therein, as against the intervener as a creditor, and that she had not, and never had or claimed to have, any interest therein save such as was conveyed to her by the said deeds of her husband. Upon these allegations he asked that the deeds mentioned be declared fraudulent and void as against him, and that they be canceled.

In the findings the court states that the plaintiff was at the time the action was begun, and ever since had been, the owner and in possession of the land in controversy, and that the

deeds mentioned were each executed for a valuable consideration, and not with the intent to hinder, delay, or defraud creditors. The findings then proceed to state the consideration for the deeds. From this statement it appears that the husband was the owner of the land and desired to obtain a loan; that in order to do so he was required to give his note, executed jointly by himself and wife; that he agreed with his wife that if she would sign the note as surety for him he would hold her harmless and secure her against all liability by reason thereof; that in pursuance of this agreement they executed the note, and also a mortgage on the land in controversy to secure the same, and the loan was obtained thereby; that the note became due and was not paid by the husband, and that thereafter, for the purpose of fulfilling the agreement aforesaid with his wife, and to secure her against all liability on the note, and also to secure his creditors who had liens on the land, the husband executed the deed of September 25, 1897. The court further finds that "ever since the execution of said last-mentioned deed, the said plaintiff has been, and yet is, the owner of all the real estate therein described," and that in "pursuance of the purposes of said conveyance as aforesaid, said plaintiff paid" the note and caused the mortgage to be satisfied. The findings with respect to the consideration and effect of the conveyance of March 1, 1898, are precisely similar, except that it involved a different note and mortgage. It is then further found that Edward White has not been the owner of the land, or of any right, title, interest, or estate therein or claim thereto at any time since the execution of the first deed to the plaintiff, September 25, 1897.

The appellant now claims that under these findings he is entitled to judgment. The ground for this contention is, that the deeds were given as security only, and that, although absolute in form, they constitute in law nothing more than a mortgage. Hence he contends that, although the mortgage is prior to his judgment, the title still remains in Edward White, and he is entitled to have the lands sold on his execution subject to the mortgage.

If the intervener had tendered any issue involving the proposition that the deeds were intended merely as mortgages, or had filed any pleading alleging the facts included

in the findings tending to that conclusion, and asking relief on that ground, and the court had made its finding squarely upon such issue, perhaps the contention might have been sustained. The complaint in intervention states only a cause of action to set aside the deeds on the ground that they were made to defraud creditors, and it states no facts upon which to found the claim that the deeds were intended merely as mortgages. Upon the cause of action to cancel the deeds the court found as a fact that there was no fraudulent intent, and that Edward White was not insolvent nor in contemplation of insolvency at the time he executed them. This being the case, it is immaterial whether there was or was not a valuable consideration. There being no intent to defraud, and the grantor being neither insolvent nor in contemplation of insolvency, the deeds were valid, although made without consideration. (Civ. Code, sec. 3442; *Bull v. Bray*, 89 Cal. 286; *Threlkel v. Scott*, 89 Cal. 353; *Haas v. Whittier*, 97 Cal. 420; *Knox v. Moses*, 104 Cal. 505.)

The complaint of the intervener is not addressed to the plaintiff's complaint, does not purport to be an answer thereto, and contains no allegations in the form of denials. It states an independent cause of action, and is in effect a cross-complaint for affirmative relief. Hence the averment therein that Anna R. White is not, and never was, the owner of the land cannot be deemed a denial of the allegation of the plaintiff's complaint that she is such owner.

In suits to quiet title and actions in ejectment it has been frequently decided that an allegation of ownership in the complaint which is denied in the answer raises an issue upon which the defendant may show that a deed under which plaintiff claims title was given as security for the debt and was intended as a mortgage. And perhaps this doctrine would be extended to suits to enjoin an execution sale such as that of the plaintiff herein, so that the defendant, Besse, upon that issue could have had the judgment reversed if he had appealed. But the defendant does not appeal, and the intervener has not in any manner connected himself with the pleadings between the plaintiff and defendant, and cannot obtain any advantage therefrom. He must rest his case on appeal solely on the cause of action stated in his complaint in intervention.

In actions for relief on the ground of fraud, such as that of the intervener, where, after averments that a deed purporting to convey title was in fact fraudulent and void, the pleader concludes with a statement that the grantee is not the owner of the property described in the conveyance, the latter allegation cannot be allowed to change the cause of action from a suit to declare the deed fraudulent as against creditors to an action to declare that it was in legal effect a mortgage, nor to give the complaint the effect of stating two distinct causes of action, nor even to lay the foundation for evidence and findings to the effect that the deed, although not fraudulent, was intended as a mortgage, and did not convey title. The allegation in the intervener's complaint that the plaintiff is not, and never was, the owner of the land, in the connection in which it is found as part of a complaint to set aside deeds as fraudulent, is a mere conclusion from the previous statement that the deeds were made with intent to defraud creditors, and for no valuable consideration. In so far as the findings tend to show that the deeds were in effect mortgages, they must, so far as the intervener is concerned, be held to apply, as the findings show they were intended to apply, exclusively to the question of the consideration for the deeds, and they do not justify a judgment for the intervener which would be in reality a judgment in his favor upon a cause of action not alleged by him nor involved in the issues between him and the plaintiff.

The judgment is affirmed.

Angellotti, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[Sac. No. 1269. In Bank.—November 4, 1904.]

FREDERICK D. SPRAGUE, Executor of Will of Moses Sprague, Deceased, Respondent, v. **HATTIE S. WALTON**, Individually, and as Executrix of the Will of Nancy M. Sprague, Deceased, and **B. F. WALTON**, Co-Executor of Will of Moses Sprague, Deceased, Appellants.

ACTION BY EXECUTOR—RECOVERY OF COMMUNITY PROPERTY—DEFENSE OF GIFT TO WIFE—CO-EXECUTOR AS DEFENDANT—SERVICE OF NOTICES.

In an action by one of the executors of the will of a deceased husband to recover community property from the executrix of the will of a deceased wife, who defended upon the ground of a gift from the husband to the wife, a co-executor of the will of the husband made defendant because he refused to join as co-plaintiff, and who denied the interest of the husband, but against whom no relief was granted, and who is not mentioned in the judgment for plaintiff, is not an adverse party on whom the executrix of the deceased wife was required to serve her notice of motion for new trial or her notice of appeal.

1D.—DEPOSITS IN BANK—GIFT—PRESUMPTION—BURDEN OF PROOF—FINDING—SUFFICIENCY OF EVIDENCE.—Whether deposits in bank of community property in the name of the husband were a gift to the wife depends upon his actual intention, where he did everything necessary to complete a gift thereof if he intended one; but though the evidence seems very strong and persuasive that a gift was intended, yet, the burden of proof being upon the defendant to show a gift from the husband to the wife, a finding to the contrary, resting upon the legal presumption in favor of the husband, cannot be set aside on the sole ground that the finding of no gift is wholly unsupported.

1D.—ERROR IN EXCLUSION OF EVIDENCE—DECLARATIONS OF HUSBAND ACCOMPANYING WRITTEN AUTHORITY TO WIFE.—Where the husband, while sick and confined to his bed, after having bequeathed everything to his wife, gave to her written authority to withdraw all bank deposits standing to his credit, with the words appended to such written order, "and to have the right of survivorship," it was error to exclude evidence of the oral declarations of the husband, at and about the time he signed the written orders upon which his wife withdrew the deposits, declaratory of his intention to make her a gift of the money. Such declarations do not vary the written contract; and the question is not governed by subdivision 4 of section 1870 of the Code of Civil Procedure, but by subdivision 2 of that section.

1D.—FORM OF ORDERS—"RIGHT OF SURVIVORSHIP"—INDICATION OF TRUST.—The words "and to have the right of survivorship" in the

orders indicate an intention of the husband to create a trust in favor of the wife; and if such was the intention, even if it was not intended that she should withdraw the money until after his death, the bank would be a trustee for her benefit as survivor. The fact that the wife withdrew the money before her husband's death would not defeat the intention to create a trust in her favor.

Id.—RIGHT OF ACTION—PRESENTATION OF CLAIM—IDENTIFICATION OF DEPOSITS.—If it shall be found that the deposits did not pass to the wife either as donee or beneficiary of a trust, they may be recovered by the husband's executor, so far as identifiable, without presentation of a claim against the estate of the deceased widow. Upon such supposition, the deposits sued for are not a part of the latter estate, and the action will lie if the thing demanded can be identified in specie as the property of the husband.

Id.—STATUTE OF LIMITATIONS—TRUST—WIDOW AS EXECUTRIX.—Upon the same supposition, the wife held the money in trust for the husband at his death, and the statute of limitations did not commence to run in favor of the widow while she remained executrix of the will of the deceased husband, regardless of her failure to include the deposits in the inventory of his estate; and the action to recover the money from the executrix of the deceased widow is not barred by the statute where she was appointed as such less than two years before the action was commenced.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order denying a new trial. J. W. Hughes, Judge.

The facts are stated in the opinion of the court.

Phipps & Henion, and Devlin & Devlin, for Appellants.

The court gave judgment against the general assets of the estate of the deceased widow. This was erroneous, the money not having been identified nor a claim presented against the estate. (*Lathrop v. Bampton*, 31 Cal. 17;¹ *Rowland v. Madden*, 72 Cal. 18-20; *Falkner v. Hendy*, 107 Cal. 54; *In re Smith*, 108 Cal. 122; *Bemmerly v. Woodward*, 124 Cal. 568; *McGrath v. Carroll*, 110 Cal. 82; *Orcutt v. Gould*, 117 Cal. 310.) A trust was created for the wife by the form of the written orders. (*Booth v. Oakland Bank of Savings*, 122 Cal. 19; *Hellman v. McWilliams*, 70 Cal. 449.) There was a completed gift consummated by delivery. (Civ. Code, secs. 1146, 1147; *Williams v. Tam*, 131 Cal. 64; *Hamilton v. Hubbard*, 134 Cal. 603; *In re Stevens*, 83 Cal. 322;² *Vandor v. Roach*,

¹ 89 Am. Dec. 141.

² 17 Am. St. Rep. 252.

73 Cal. 614.) The presumption is in favor of lawful possession of the money. (Code Civ. Proc., sec. 1963.) There was no express trust in favor of the husband, and the action was barred by the two years' statute. (Code Civ. Proc., sec. 339; 13 Am. & Eng. Ency. of Law, pp. 684, 685; 2 Wood on Limitations, pp. 521, 522.) It was error to exclude evidence of Moses Sprague's declaration of his intention to make a gift to his wife. (Code Civ. Proc., sec. 1853; *Ruiz v. Dow*, 113 Cal. 490; Thornton on Gifts, secs. 222-224; *Waite v. Grubbe*, 43 Or. 406.¹)

A. M. Seymour, and R. Platnauer, for Respondent.

The right of the husband to the deposits was not relinquished by their authorized withdrawal. (*Zeller v. Jordan*, 105 Cal. 143, 148; *Booth v. Oakland Bank of Savings*, 122 Cal. 19; *Dougherty v. Moore*, 71 Md. 248;² *Beaver v. Beaver*, 117 N. Y. 421, 429;³ *Taylor v. Henry*, 48 Md. 550;⁴ *Marshall v. Crutwell*, L. R. 20 Eq. 328.) No trust was created. (Civ. Code, secs. 2221, 2222; *Norway Savings Bank v. Merriam*, 88 Me. 146; *Beaver v. Beaver*, 117 N. Y. 422;⁵ *Young v. Young*, 80 N. Y. 422, 437;⁶ *Cunningham v. Davenport*, 147 N. Y. 43;⁷ *Burling v. Newlands*, 112 Cal. 476.) Plaintiff's claim is not barred by the statute. The wife held the money as executrix, upon qualifying. (Code Civ. Proc., sec. 1447; *Matter of Consalus*, 95 N. Y. 340; *Commonwealth v. Gould*, 118 Mass. 300, 307; *Hall v. Pratt*, 5 Ohio, 73, 81; *McGaughey v. Jacoby*, 54 Ohio St. 487; *Estate of Miner*, 46 Cal. 564, 571; *Matter of Armstrong*, 69 Cal. 239; *Treweek v. Howard*, 105 Cal. 434, 446.) The statute could not run in her favor while she was the trustee of an express trust, as executrix. (*Magraw v. McGlynn*, 26 Cal. 420; *Ex parte Smith*, 53 Cal. 204; *Fox v. Tay*, 89 Cal. 339;⁷ 13 Am. & Eng. Ency. of Law, 685.) The action was not barred as to the defendant, the cause of action not accruing against her with her appointment as executrix. (Code Civ. Proc., sec. 343; *Hecht v. Slaney*, 72 Cal. 363; *Barker v. Hurley*, 132 Cal. 26.) No claim was required to be presented against the estate of Nancy Sprague, the de-

¹ 99 Am. St. Rep. 764.

² 17 Am. St. Rep. 524.

³ 15 Am. St. Rep. 531.

⁴ 30 Am. Rep. 486.

⁵ 36 Am. Rep. 634.

⁶ 49 Am. St. Rep. 641.

⁷ 23 Am. St. Rep. 474.

posits being identifiable. (*People v. Houghtaling*, 7 Cal. 348; *Stanwood v. Sage*, 22 Cal. 516; *Roach v. Caraffa*, 85 Cal. 436; *Heydenfeldt v. Jacobs*, 107 Cal. 373; *Elizalde v. Elizalde*, 137 Cal. 634, 641.) The presumption is, that the money deposited by Nancy Sprague when she withdrew her husband's deposits was part of the trust fund. (*Elizalde v. Elizalde*, 137 Cal. 634, 641; *Importers' etc. Nat. Bank v. Peters*, 123 N. Y. 272, 278; *National Bank v. Insurance Co.*, 104 U. S. 54; *Myers v. Board of Education*, 51 Kan. 87;¹ *McLeod v. Evans*, 66 Wis. 401.²) Parol evidence was not admissible to vary the terms of the written orders for the money. (Civ. Code, secs. 1625, 1639; Code Civ. Proc., sec. 1856; *Nicholson v. Tarpey*, 89 Cal. 617, 621; *Harrison v. McCormick*, 89 Cal. 327;³ *Schroeder v. Schmidt*, 74 Cal. 459; *Beall v. Fisher*, 95 Cal. 568.)

BEATTY, C. J.—This is an action by one of the executors of the will of Moses Sprague to recover from the executrix of Nancy Sprague (who was the wife of Moses) a sum of about thirty-eight hundred dollars, the amount of two savings-bank deposits—community property of the spouses originally standing in the name of Moses, but drawn out by her under written authority from him and redeposited in her own name shortly before his death.

B. F. Walton, named as a defendant, is the co-executor of the plaintiff, and is made a defendant only because he refused to be joined as a plaintiff. No relief is sought against him, and by his answer he merely denies that the estate of Moses Sprague has any interest in the deposits. Hattie Walton defends upon the ground that the deposits were a gift from Moses Sprague to her testatrix. The superior court found that there was no gift, and found against other special defenses based upon statutes of limitations. Judgment was thereupon entered in favor of the plaintiff and against Hattie S. Walton for the amount remaining of said deposits at the death of her testatrix and received by her as executrix. From this judgment and from an order denying her motion for a new trial she appeals.

It appears from the evidence in the record that Moses and

¹ 37 Am. St. Rep. 263.

² 23 Am. St. Rep. 269.

³ 57 Am. Rep. 287.

Nancy Sprague were the owners of community property, real and personal, including the deposits in question. In January, 1900, Moses, being at the time sick and confined to his bed, obtained from the banks the form of an authorization which would enable his wife to draw the deposits standing in his name, and he executed and delivered to her two orders in the form prescribed. They were substantially the same in terms, and the one addressed to the Sacramento Bank read as follows: "January 22, 1900. I hereby authorize the Sacramento Bank to allow my wife, Mrs. N. M. Sprague, to draw any money standing to my credit on Deposit No. 17097, fol. 825, in said bank and to have the right of survivorship." On the 30th of January Mrs. Sprague drew out the whole of the several deposits and immediately redeposited them in the same banks, but in her own name. On the 16th of March following Moses Sprague died. Letters testamentary were issued to his wife in July, 1900, and she took possession of his estate, but died in June, 1901, leaving the administration unclosed. Upon her death the plaintiff, Frederick D. Sprague, and the defendant B. F. Walton were appointed joint executors in her place. Subsequently her will was proved and letters testamentary were issued to her daughter, the defendant Hattie S. Walton. As executrix of her deceased husband's will, Mrs. Sprague never charged herself with anything on account of said deposits, and what remained of them passed into the hands of her executrix, who claims that they were a gift from her father to her mother and constituted no part of his estate.

The defendant urges a number of points in support of her appeal from the order denying her motion for a new trial, claiming among other things, that the court erred in finding that there was no gift of the deposits and in excluding evidence material to that issue.

The respondent makes the preliminary objection that this court is without jurisdiction to review these assignments of error because neither the notice of motion for a new trial nor the notice of appeal was served upon the defendant B. F. Walton. There is a dispute as to the fact of service of these notices upon defendant Walton, but we consider it immaterial whether they were served or not, for Walton is not an adverse party. No interest of his would be adversely affected

by the granting of a new trial or by a reversal of the judgment. Though a party to the action, he is not mentioned in the judgment, which was exclusively in favor of the plaintiff and against Hattie S. Walton. If the judgment stands, no part of the amount recovered could be collected by him. He would not be charged with it in his accounts, and would be entitled to no commissions thereon. (Code Civ. Proc., secs. 1613, 1615; *Hope v. Jones*, 24 Cal. 89.) He neither pays nor recovers costs, and the only possible effect of a reversal and new trial is, that he might be benefited by the recovery of his costs in case of an ultimate judgment for the defendants.

Whether or not there was a gift of these deposits by Moses Sprague to his wife depends wholly upon his actual intention. He did everything necessary to the validity of the gift, if he intended a gift. He gave his wife orders in the form prescribed by the banks which enabled her to cancel his accounts and transfer the deposits to her own account; in effect, he put her in possession of the funds and deprived himself of all control. If he intended to do this, and intended it as a gift, the gift was complete.

The evidence that he did intend a gift seems to us very strong. He was sick and confined to his bed. On the 1st of January he had executed a holographic will, or codicil to his attested will, by which he had given everything he possessed to his wife. That he intended her to have these deposits is clear, and the only question is whether he intended that she should take them under the will or as a gift free from the burdens of administration. When he made his holographic will on the 1st of January no doubt he intended her to take under the will, but it would appear that before the 22d of the month he had changed his mind. Why, if he did not intend her to take the deposits as a gift, should he have given her authority to draw *both* deposits, amounting to nearly four thousand dollars? She needed no such sum to pay current or household expenses, but in case of his death (and he was on his death-bed) it would be extremely convenient for her to have control of this fund of ready money pending administration of his estate. Considering that he intended her to have his whole estate in any event, there were good reasons why he should make her a present gift of a fund which would relieve her of the necessity of applying to the probate court

for the means of support prior to distribution. But the burden of proving a gift rested upon the defendant, and it was essential for her to prove, among other things, that Moses Sprague intended a gift of the deposits. The evidence upon this point was, in our opinion, very persuasive, and there was uncontradicted and unquestioned evidence to prove the delivery of the deposits, or, what is the same thing, the furnishing of the means by which they could be reduced to possession by the donee if she was a donee. But this court can neither make a finding nor direct one where the evidence, however persuasive, is opposed to a presumption, as in this case. Nor can it be said in this case that the evidence of a gift is so absolutely convincing that the order denying a new trial could be reversed on the sole ground that the finding of no gift is wholly unsupported.

But the superior court erred in excluding evidence of the oral declarations of Moses Sprague at and about the time he signed the orders upon which his wife drew the deposits. It does not appear from the bill of exceptions what was the particular reason for these rulings, but in the brief of respondent they are defended upon the ground that the effect of the declarations would be to contradict or vary the terms of the written orders. The rulings cannot be sustained upon that ground. The orders related solely to a matter between Moses Sprague and the banks. It was not necessary for him to inform the banks of his purpose in putting the deposits under control of his wife. His purpose was a matter between him and her exclusively, and was manifested and could be proved by his contemporaneous declarations, or by his declarations made before or after delivering the orders. There is no better proof of intention than declared intention, and it is often the only means of proof. The question here is not governed by subdivision 4 of section 1870 of the Code of Civil Procedure, but by subdivision 2 of that section.

We do not deem it necessary to notice particularly the several cases cited by respondent in support of his contention that there was a failure in this case to make a gift, even if a gift was intended. The case of *Zeller v. Jordan*, 105 Cal. 147, is fairly representative of the other cases cited and clearly exhibits the distinction which makes them one and all inapplicable to this controversy.

That was a claim of gift from a deceased wife. All the surviving husband had to show was an undated check on a savings bank for nineteen thousand dollars. He could not have drawn the money without the pass-book, and he never had the pass-book. And, besides, he testified himself that it was not intended that he should use the check until after his wife's death. And so in all the cases the supposed gift was not delivered or put in the power of the person claiming as donee. Here the means of reducing the deposits to possession were placed in the hands of Mrs. Sprague, and she took possession in her husband's lifetime. If this taking possession was in accordance with the understanding between her and her husband the gift was complete.

It is necessary perhaps in view of the further proceedings in the trial court to notice briefly one or two other points.

Even if it should be found that it was not the intention of Moses Sprague that his wife should draw out the deposits or change them to her own account in his lifetime, the form of the orders ("with right of survivorship") indicates his intention that she should take them as survivor after his death; and if such was his intention, the transaction would be brought within the doctrine of *Booth v. Oakland Bank*, 122 Cal. 19, where it was held that an arrangement substantially the same as in this case constituted the bank a trustee of the deposit for the benefit of the parties to whom the depositor desired the money to be paid in case of her death. The fact that Mrs. Sprague actually drew the money before her husband's death would not defeat the intention to create a trust in her favor.

If it shall be found that these deposits did not pass to Nancy Sprague either as donee or beneficiary of a trust, they may be recovered so far as identifiable without presentation of a claim against the estate of Nancy Sprague. The right to sue an executor or administrator in cases like this without presentation of a claim against his decedent's estate arises from the fact that the specific thing sued for is not a part of such decedent's estate, and the action will lie whenever the thing demanded can be identified in specie as the property of another.

The superior court did not err in finding that the action was not barred by the statute of limitations. If the money in the

hands of Hattie S. Walton was identified as a part of the deposits originally standing in the name of Moses D. Sprague, and if there was no gift to his wife or trust for her benefit, she held them in trust for him at the time of his death. They were his property, and recoverable in specie, and the claim of his representatives is protected from the running of the statute of limitations in favor of his executor in the same way and upon the same principle that applies to a debt from an executor or administrator to his decedent. The claim against Nancy Sprague was not discharged by her appointment as executrix. She should have included the deposits in her inventory, and whether she did or not the statute did not run in her favor. (Code Civ. Proc., sec. 1447.) As to the defendant, she was appointed executrix of Nancy Sprague's will less than two years before the action was commenced, and there is no clause of the statute which could possibly bar the action against her within that period.

We discover no error in the judgment, but the order denying a new trial is reversed for the reasons stated and the cause remanded.

Henshaw, J., McFarland, J., Angellotti, J., Van Dyke, J., and Lorigan, J., concurred.

[S. F. No. 3700. Department Two.—November 5, 1904.]

In the Matter of the Estate of JOSEPH BELLAMY FIRTH, Deceased. JOSEPH KIRK FIRTH and FANNY FIRTH, Appellants, v. EVELINA L. FIRTH, Respondent.

ESTATES OF DECEASED PERSONS — PROBATE HOMESTEAD — RIGHTS OF WIFE.—The right of the surviving wife to a probate homestead is an independent right which she has in addition to any other right or property which she may have, whether acquired under her husband's will or otherwise.

ID. — DEVISE OF RESIDENCE TO WIFE — HOMESTEAD UPON PROPERTY OTHERWISE DEVISED — JURISDICTION OF COURT.—The devise to the wife of the house and lot in which the deceased husband lived with her for several years prior to his death, does not affect the jurisdiction of the court to set apart a homestead to her for life out of

other separate property of the husband, though devised to other persons. The right to devise is subject to the power of the court to set apart a homestead.

ID.—QUALIFICATION OF WIFE AS EXECUTRIX—HOMESTEAD NOT WAIVED.—

The wife did not waive her right to a probate homestead by qualifying as executrix under the will.

ID.—IMPROPER PART OF ORDER—DETERMINATION OF TITLE.—

It was improper to include in the order setting apart the homestead a determination of where the title of the property shall vest upon the termination of the homestead. The adjudication should be limited to the question whether the wife should have the homestead.

APPEAL from an order of the Superior Court of the City and County of San Francisco setting apart a homestead. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

James G. Maguire, for Appellants.

Davis Louderback, for Respondent.

McFARLAND, J.—While the estate of Joseph Bellamy Firth was in course of administration the court made an order setting apart to the surviving widow, Evelina L. Firth, a certain part of the real property of the estate as a homestead,—and also containing an adjudication about another matter which will be noticed hereafter. From this order Joseph K. Firth and Fanny Firth, heirs at law of the deceased and devisees under his will, appeal. They are adult children by a former marriage; he left no minor children.

The facts necessary to the determination of this appeal are these: All the property of the deceased was his separate property, and it was of the appraised value of \$23,584. He left a will by which he devised to the widow a lot with a house thereon situated on Guy Street, in San Francisco, in which he had lived with her for several years immediately prior to his death. It was a suitable place for a residence and was of the appraised value of thirty-five hundred dollars. He also left her one thousand dollars in money, and directed that during the period of administration she should have forty dollars per month. The rest of his property he gave to others, the most of it going to the appellants herein. The property which the court set aside as a homestead was a lot twenty-five

feet front, with a house thereon, situated on Tehama Street, in said city, and it also was suitable for a residence, and was of the appraised value of thirty-five hundred dollars. This lot is a part of the property devised in the will to the appellants. There never had been any recorded homestead by either the deceased or the respondent. The respondent and Joseph K. Firth, one of the appellants, were appointed executors and qualified. The homestead was set apart to respondent for and during her life.

The main contentions of appellant as to the part of the order setting apart the homestead are,—1. That the court had no power or jurisdiction to make the order, because the respondent had another residence at the time the order was made; and 2. That under the condition of the estate, and the circumstances presented, the making of the order was an abuse of discretion. Neither of these contentions is, in our opinion, maintainable.

The jurisdiction of a probate court to set aside a homestead to the surviving wife is not subject to the condition that she does not have any other property, or any other property fit to live in. Such jurisdiction is excluded only when she has already a legal homestead; and a mere place fit to reside in is not a homestead unless it has been impressed with that character by certain acts required by the law to be done for that purpose. The code provides that if no homestead "has been selected, designated, and recorded, . . . the court must select, designate, and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife . . . out of the common property, or if there be no common property, then out of the real estate belonging to the decedent." (Code Civ. Proc., sec. 1465.) (There is also another provision that if the probate homestead be selected out of the separate property of the deceased it must be only for a limited period; which provision was followed in the case at bar.) This power and duty of the court to set apart the homestead is not, in any part of the statutory law, limited to a case where the widow has no other property; and if she has other property, it matters not how she had obtained it,—whether under her husband's will or otherwise. Her right to a probate homestead is an independent right which she has in addition to any other right or property which she may have. A somewhat

plausible argument might perhaps be made to the point that a very wealthy widow should not be allowed a probate homestead on her deceased husband's separate property (although it would not apply to the case at bar); but such an argument would be properly addressed only to the legislature in support of an amendment to the law on that subject, for courts must take the law as they find it. And the power of the court to set aside a homestead on property which had been devised to others is well established. In *Estate of Huelsman*, 127 Cal. 275, the court say: "Despite the fact that the farm had been specifically devised, one half to the widow, the other half to the two children, it was competent for the probate court to set it aside as a homestead, for the right of a testator to devise is subordinate to the power in the probate court to sequester and set apart the property for the shelter, care and support of the family." (See, also, cases there cited.) Nor did the respondent by qualifying as executrix under the will waive her right to a homestead. In *Sulzberger v. Sulzberger*, 50 Cal. 385, the court say: "The acceptance by the petitioner of letters testamentary, and the fact that she was, by the will, constituted one of the residuary legatees, does not tend to show that she waived her right to a homestead as prescribed by the statute."

Whether or not this court would be justified in any case in reversing an order setting apart a homestead merely on the ground that the order was an abuse of discretion need not be here considered; for there was certainly no such abuse in the case at bar. It must be remembered that while our law is liberal to a wife with respect to community property,—that is, property acquired after marriage by the assumed joint efforts of both spouses,—yet with regard to the husband's separate property she has scarcely any right at all. He may devise it all to strangers and leave her penniless. The old estate of dower is taken away. The right to have a homestead for a limited period given her by the probate court is about the only interest which she can assert in a deceased husband's property. In the case at bar the homestead awarded her is much less in value than her interest would have been under the law of dower; and there is no warrant for holding that in awarding it the court abused its discretion.

But in the order and decree appealed from the court, in addition to setting aside the homestead to the respondent for her lifetime, decreed that the fee in remainder vested in certain named persons as heirs at law of the deceased; and, in our opinion, this last part of the order was beyond the jurisdiction of the court to make. It is true that by section 1468 of the Code of Civil Procedure it is declared as a general rule of property that where a probate homestead is selected for a limited period from the separate property of the deceased "the title vests in the heirs of the deceased, subject to such order"; but the question as to whom the remainder goes is not before the court on a simple petition for a homestead. No such issue was presented by the petition or the answers thereto, nor could such issue have been legitimately presented. When there is a contest between different persons claiming in hostility to each other to be heirs, that contest must be adjudicated in an appropriate action or proceeding in which the issue of heirship properly arises. This matter is perhaps not very important in the case at bar, as there seems to be no disagreement as to who the heirs are; but in many cases there are sharp contests as to heirship. At all events, in the present proceeding the only question involved was whether or not the respondent should have the homestead, and the adjudication should have been limited to that question. The order must therefore be modified by striking out that part of it which undertakes to adjudicate heirship. In other respects the order must be affirmed.

The order appealed from is modified by striking therefrom the following: "And the title to said lot of land with the dwelling-house thereon and its appurtenances is hereby vested in the heirs of said Joseph Bellamy Firth, deceased, subject to this order, judgment, and decree, and said homestead, and entirely free from further administration of said estate, that is, is hereby vested in said Evelina L. Firth, the widow of said decedent, said Joseph Kirk Firth, the son of said decedent, and said Fanny Firth, the daughter of said decedent, subject to this order, judgment, and decree, and said homestead, to wit, the undivided one-third part of said lot of land, with the dwelling-house thereon and its appurtenances, and the title thereto is hereby vested in said Evelina L. Firth, and the undivided one-third part thereof is hereby vested in

said Joseph Kirk Firth, and the undivided one-third part thereof is hereby vested in said Fanny Firth, subject to this order, judgment, and decree, and said homestead." As thus modified the order appealed from is affirmed, without costs of this appeal to either party.

Henshaw, J., and Lorigan, J., concurred.

[S. F. No. 2967. Department Two.—November 5, 1904.]

**BATEMAN BROTHERS, Appellants, v. E. T. MAPEL, and
AMERICAN SURETY COMPANY OF NEW YORK,
Respondents.**

PRINCIPAL AND SURETY—CONTRACT FOR SPECIFIED MATERIALS FOR BUILDING—TOTAL BREACH—DAMAGES—EXCESS OF PRICE—LIABILITY OF SURETY.—Upon the total breach of the bond of a materialman to supply specified materials to building contractors according to the plans and specifications of the architects and to their satisfaction, the surety company is liable in damages to the extent of the bond for the excess of price which the building contractors were compelled to pay for the materials contracted for above the contract price.

ID.—INSUFFICIENT DEFENSE—MONEY ADVANCED TO PRINCIPAL—SURETY NOT INJURED.—It is not a sufficient defense by the surety to an action on the bond for such damages that the building contractors, without the previous approval of the architects, and without the knowledge of the surety, advanced large sums of money to the principal for the purpose of enabling him to purchase satisfactory materials of the kind contracted for, which he failed to do, where the surety was not injured thereby, and no part of the money so advanced was sought to be recovered from the surety.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

Sullivan & Sullivan, for Appellants.

Whitworth & Shurtleff, and Charles A. Shurtleff, for American Surety Company, Respondent.

CXLV. Cal.—16

HENSHAW, J.—This action was prosecuted by plaintiffs against the defendant Mapel, as principal, and the defendant American Surety Company of New York, as surety, for the sum of two thousand dollars, damages sustained by plaintiffs by reason of defendant Mapel's breach of a contract between himself and the plaintiffs, for the due performance of which contract the American Surety Company became responsible as surety. The action was tried against the Surety Company alone.

Mapel had entered into a contract with the plaintiffs to supply the latter at the site of the Hall of Justice building in San Francisco "all the terra cotta, ornamental pressed brick, and fireproofing of said Hall of Justice building, in accordance with the plans and specifications of same, and to the satisfaction of Messrs. Shea & Shea, architects." Bateman Brothers agreed to make payments to Mapel of "ninety per cent of the value of the materials as per this contract, delivered at said Hall of Justice, conditioned that materials are satisfactory to said Messrs. Shea & Shea, architects." The contract also contained the following clause: "It is hereby further agreed that said Bateman Brothers, if they desire, may make payments to said E. T. Mapel in advance of delivery of the said materials before mentioned to be furnished to them, and said E. T. Mapel agrees to accept such payments as part payments on this contract."

The undisputed facts are, that Mapel failed to manufacture and deliver any material. He was experimenting in his kilns and factories, but the product of them was unsatisfactory and unacceptable. To aid him in his endeavors to produce satisfactory material, Bateman Brothers advanced him moneys from time to time to the total amount of some seven thousand dollars. Mapel's efforts thus ending in a failure, plaintiffs were obliged to buy the material in the open market, and did so buy it, at a loss over the contract price of many thousands of dollars. The gravamen of their action is found in paragraph 7 of their complaint: "That by reason of the failure of said Mapel to deliver said materials mentioned in said contract, and to perform said contract, plaintiffs were obliged to purchase said materials elsewhere, and were compelled to pay and are now obliged to pay for said materials mentioned in said contract, and agreed to be delivered by said

Mapel, an amount more than \$2,000 in excess of the prices mentioned in said contract." This allegation is fully supported by the evidence, and the court finds it to be true.

The surety company set up many defenses, upon one of which the court found in its favor. This defense was to the effect that Bateman Brothers had paid to the defendant Mapel this sum of seven thousand dollars prior to the delivery by Mapel of any material, "without first or ever obtaining from Messrs. Shea & Shea, architects, as in and by said contract required, a declaration or expression of acknowledgment upon their part that the materials prepared and manufactured by the said E. T. Mapel under said contract prior to the dates of said payment and payments were satisfactory to them, the said Shea & Shea." Mapel, it appears, had conveyed to the surety company property of the value of four hundred and fifty dollars to indemnify it. Judgment for this amount was rendered in favor of the plaintiffs, but they were refused further relief. It thus appears that, in the view of the court, the moneys so advanced by plaintiffs to Mapel without the knowledge of the surety company were construed to be moneys advanced in violation of the terms of the contract and in impairment of the surety's rights, and that the surety was thus exonerated, excepting for the value of the indemnifying property of the principal which it held in its possession. The briefs in this case are devoted largely, if not wholly, to the proper construction of the contract in this regard, but in the view which we take of the case that construction is wholly immaterial, although it may be said that it was properly construed by the court. The contract contemplated the privilege to the plaintiffs to pay at their pleasure in advance of delivery, but the condition as to approval by the architects was not waived. It was still required that the material should be acceptable to the architects before such payment was justified under the contract.

But, as we have said, this determination is immaterial and quite inconclusive of the case. If the payments were made within the terms of the contract, then clearly the surety cannot be heard to complain. If they were not, then they were merely advancements of money made by plaintiffs to defendant Mapel entirely without the terms of the contract, and the surety has no grievance, unless in some substantial

way his condition is changed or a new liability is sought to be imposed upon him because of such payments.

"A surety has all the rights of a guarantor, whether he becomes personally responsible or not." (Civ. Code, sec. 2811.)

"A surety is exonerated—1. In like manner with a guarantor; 2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security." (Civ. Code, sec. 2840.)

"A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended." (Civ. Code, sec. 2819.)

It is of course well recognized that the surety is favored in law, and that any act injurious to his rights will operate as an exoneration under his contract. Sutherland thus expresses it: "A surety is a favorite of the law, and where any act is done by the obligee that may injure him, the courts are very glad to lay hold of it in his favor. If the creditor does any act injurious to the surety, or inconsistent with his rights, . . . he will be discharged." (3 Sutherland on Damages, 3d ed., sec. 735.)

Thus the question whether the advancements made by Bateman Brothers were or were not within the strict terms of the contract could only affect the surety if in fact they were improperly made, and if a recovery was sought against the surety because of them, or because of some other change in its condition because of them. But such is not this action. Plaintiff does not plead the payments. He bases no claim for a recovery upon them, and the surety can avail himself of them to defeat a recovery only if the making of them has prejudiced him, or if the making of them has altered the original obligation of the principal in some respect, or if thereby the remedies or rights of the creditor or of the surety against the principal have become in some way impaired or suspended. Such is not the case here presented. So far as the contract is concerned, since no material was delivered

by Mapel, and no material had been accepted by the architects, there were no payments to be made, and the payments which were made were mere voluntary loans to Mapel, the better to enable him to perform his contract. These advancements did not injuriously affect the rights of the surety, nor did they affect them at all. At the utmost, it was but a transaction outside of the contract to the benefit of both Mapel and his surety, in that it supplied the former with money by which he could complete his contract, if it were possible for him to do so at all. So, as we have said, if a recovery were here sought against the surety because of these advancements, he might well be heard to say that he was not responsible therefor, and was exonerated under his bond, because they were not made in accordance with its terms. And such were the precise facts in *United States v. Tillotson*, 1 Paine, 305. In that case the United States had advanced to its contractors large sums of money to aid in the construction of a fort, under a contract providing restrictions and limitations in the payment of the money, to the effect that materials should be delivered with the invoices at the fort and pronounced by the engineer of proper quality, and that payments should be made at the end of each month for the work actually performed. The United States sued the surety upon his bond, alleging that of the large advancements so made the contractors had accounted in work and material for but a very small sum, and the recovery was sought for the difference between the amounts so advanced by the United States and the amounts accounted for by the contractors. But it was made to appear that the payments by the United States were without the terms of the contract, and under the plainest principles of suretyship it was held that the limitations as to payment ran with the surety's contract, and that they were exonerated as to all payments made not in accordance with these limitations and conditions. So here, as has been said, if the recovery were sought for the seven thousand dollars so advanced, the materials for which were not furnished, the surety could rightfully claim his exoneration. But such is not this action. The surety has not been injured by these payments, and a recovery is not sought on account of them. The case in effect is, that notwithstanding the liberality of the plaintiffs in advancing moneys to enable the contractor

to furnish the materials, he still failed to do so, compelling plaintiffs to purchase the materials in open market, and for the difference between the contract price and the price paid in open market the surety is responsible to the extent of his undertaking.

It follows, therefore, that the alleged defense is not a defense to the action, and that upon the facts found plaintiff is entitled to the judgment prayed for. It is therefore ordered that the judgment appealed from be reversed, and that upon the findings made the court enter its judgment in favor of plaintiffs.

McFarland, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[S. F. No. 3016. Department One.—November 7, 1904.]

FANNIE STOCKTON, Appellant, v. BOARD OF EDUCATION OF THE CITY OF SAN JOSE et al., Respondents.

SCHOOL LAW—DISMISSAL OF TEACHER—ABSENCE OF CERTIFICATE.—A teacher who has never held a city or city and county certificate does not come within the terms of section 1793 of the Political Code, providing that holders of such certificates shall be dismissed only for insubordination or other causes.

ID.—SAN JOSE CHARTER—CONSTRUCTION—"PERMANENT POSITIONS"—DISMISSAL AT END OF YEAR.—Upon a proper construction of the original charter of San Jose, the only "permanent positions" of teachers thereunder were of those who were reported favorably by the classification committee of the board of education at the close of the school year, and a teacher not protected by the Political Code may be dismissed at the end of any school year under that charter upon failure of the classification committee to recommend a retention of said teacher for the ensuing year.

APPEAL from a judgment of the Superior Court of Santa Clara County. M. H. Hyland, Judge.

The facts are stated in the opinion of the court.

John G. Jury, and D. M. Delmas, for Appellant.

H. L. Partridge, F. C. Jacobs, and Joseph H. Patton, for Respondents.

ANGELLOTTI, J.—This is an appeal, on the judgment-roll, from a judgment denying the application of plaintiff for a writ of mandate compelling defendants to admit plaintiff to the use and enjoyment of her alleged right to act as a teacher in the school department of the city of San Jose.

The plaintiff has never held a "city" or "city and county" certificate, and therefore does not come within the provisions of section 1793 of the Political Code, providing that holders of such certificates, when elected, shall be dismissed only for insubordination or other causes. No other provision of the general state law applicable to common schools is cited as precluding the board of education of the city of San Jose from removing plaintiff at its pleasure, and plaintiff bases her claim entirely upon certain provisions of the charter of such city as originally adopted and as they existed until amended in the year 1901 (Stats. 1897, p. 592), contending that she was regularly elected a "permanent teacher" of the school department within the meaning of such provisions, and that she has never been legally removed from that position.

In view of the fact that the San Jose charter provisions relative to the *status* of teachers, and the right and manner of their removal, were materially amended in 1901 (Stats. 1901, p. 957), the question as to the proper construction of the original charter provision is no longer of general interest, and affects only those who, like this plaintiff, may have been retired thereunder.

As originally adopted, the charter provided in section 5 of article IX that the powers and duties of the board of education are as follows: "Third—To employ, pay and dismiss teachers, janitors, school-census marshals, and such persons as may be necessary to carry into effect the powers and duties of the board, and to fix, alter, allow, and order paid their salaries or compensation, . . . provided, that no election of a teacher or other person employed by the board shall be construed as a contract, either as to the duration of time or

amount of wages of such person." It further provided for a standing committee on classification, to consist of two members of the board of education and the city superintendent, the duties of the members of which were, among other things, to make themselves thoroughly acquainted by personal inspection with the work of every employee of the board, and to make a written report to the board at least twenty days before the close of any school year, and to therein "distinctly state what employees shall, in their opinion, be retained for the ensuing year." (Charter, art. IX, sec. 13.) It was further provided by section 14 of article IX as follows, namely: "No teacher shall be elected or appointed to a position in the school department except in technical or industrial schools that may be established, or as special teacher of some branch, who does not hold a California primary or grammar grade certificate, in full force; and no one shall be elected to a permanent position who has not taught successfully at least one school year in the schools of the city. All teachers thus elected to permanent positions in the department, who are reported upon favorably by a majority of the committee on classification, shall retain their positions for the ensuing year without re-election, and shall be removed only for cause. No teacher shall be removed from a position held in the schools of the city, except by the votes of four members of the board. . . ."

These are the only provisions that at all bear upon plaintiff's case.

The findings show that on June 2, 1897, the classification committee, by its written report, recommended that plaintiff be retained in her position as a teacher for the ensuing school year. She entered upon the discharge of her duty as such teacher, and continued to act until the close of the school year, June 30, 1898. The committee did not report favorably upon her for the ensuing year, and she ceased to act as a teacher until December 5, 1898, when she was elected "as a regular teacher in the school department," and acted as such until the end of the school year, June 30, 1899. The classification committee recommended her for employment as a teacher for the school year ending June 30, 1900, and she, pursuant to that employment, entered upon her duties as a teacher and continued to act until the last-named date. The majority of the classification committee did not report favorably upon

her for the ensuing school year, and the report excluding her, by failing to report favorably upon her, was regularly adopted by the board of education, and she was not re-elected. Since that time she has not been recognized as a teacher by the board, and has not been allowed to perform any of the duties of a teacher. In addition to these specific findings, the trial court found that plaintiff never was "elected to a permanent position, or employed as a permanent teacher in the school department of the city of San Jose."

The charter, as it then stood, nowhere defined the term "permanent position" or "permanent teacher." It made a distinction between such teachers and others, and by section 14 of article IX sought to confer some advantage as to tenure upon those who had been elected to "permanent positions," and had thus become "permanent teachers" of the department. But that advantage, as we read the charter provisions, was the advantage of only such permanent teachers as were reported upon favorably by a majority of the committee on classification, at the close of any school year, and simply gave to them the right to hold their positions for another school year, without re-election by the board, unless removed "for cause." In other words, there was no "permanent position" in the broad sense that one elected to such a position continued to hold indefinitely, in the absence of removal for cause, but the position was "permanent" only so long as a majority of the classification committee, at the close of each school year, reported favorably upon the incumbent. In the absence of such a favorable report, the board of education, without other cause, had the right to remove the incumbent.

Whatever right the incumbent of a "permanent position" had to continue in the position, notwithstanding the express desire and act of the board of education to the contrary, must be found in that provision of section 14 of article IX which declares that "all teachers thus elected to permanent positions in the department, who are reported upon favorably by a majority of the committee on classification, shall retain their position for the ensuing year without re-election, and shall be removed only for cause."

If that provision had not been incorporated in the charter, there could be no doubt that the board of education could remove any teacher, permanent or otherwise, at will, by a

vote of four members of the board. This provision was the only limitation on that absolute power that was contained in the charter. By its express terms, the limitation was applicable not to all those who had been merely elected to permanent positions, but only to those who, having been so elected, were favorably reported upon by a majority of the committee on classification, at the close of a school year. It gave to those who were so favorably reported upon the right to continue in their positions for another school year, unless removed for cause. Such is the plain reading of the limitation upon the power of the board to remove at will, and the plaintiff, not having been favorably reported upon by the committee on classification at the close of the school year in 1900, did not come within its provisions.

The provision of subdivision 3 of section 5 of article IX of the charter, "that no election of a teacher or other person employed by the board shall be construed as a contract, either as to the duration of time or amount of wages of such person," in no degree assists plaintiff. The object of this provision was clearly to protect the city against the claim of any one who might contend that by reason of his election he was entitled to serve for any particular time or at any particular compensation. One elected to a position in the department acquired, as claimed by plaintiff, a "*status*" thereby, but it was a *status* that could be terminated by the board of education at any time, subject to the limitations already mentioned.

It is contended that the findings show an irregularity in the proceedings of the classification committee, in that the majority report had not been adopted at any formal meeting of the committee, it having been prepared and signed by a majority, and without prior consultation with the third member, was presented to him for signature. A sufficient answer to this contention is, that in the absence of a favorable report of the committee as to an incumbent, there is no limitation on the power of the board to remove the incumbent.

In view of our conclusion as to the proper construction of the charter provision, it is not necessary to determine whether the specific findings show that plaintiff was a "permanent teacher," nor is it necessary to consider the suggestion of

defendants to the effect that the charter provisions are in conflict with the general state law relative to common schools. The judgment is affirmed.

Shaw, J., and Van Dyke, J., concurred.

[S. F. No. 2952. Department Two.—November 7, 1904.]

JOHN FREY et al., Respondents, v. A. VIGNIER, Executor, etc., and MARY EISEN, Executrix, etc., Appellants.

APPEAL FROM ORDER DENYING NEW TRIAL—REVIEW—SUFFICIENCY OF COMPLAINT.—The sufficiency of the complaint can only be considered upon an appeal from the judgment, and is not reviewable upon appeal from an order denying a new trial.

ID.—QUALIFICATION OF WITNESS—ACTION BY LESSEE UPON CONTRACT OF DECEASED LESSOR—ASSIGNMENT BEFORE CONTRACT.—A witness who had assigned all his interest in a lease and in business upon the leased premises before a fire injuring the leased property and destroying a kiln thereupon is not the assignor of a cause of action for breach of a contract of the lessor, made after the fire, to repair the leased premises and rebuild the kiln, and is not disqualified to testify to events occurring before the death of the lessor, under section 1880 of the Code of Civil Procedure.

ID.—STATUTE OF LIMITATIONS—AMENDMENT OF COMPLAINT—CAUSE OF ACTION NOT CHANGED—IMMATERIAL VARIANCE.—Where an amendment to the complaint does not change the cause of action, but refers solely to the cause of action originally alleged and facts existing at the time of its accrual, and merely omits certain matters which do not show a material variance, the statute of limitations has reference only to the original complaint, and does not extend to the time of filing the amendment.

ID.—CONSIDERATION FOR PROMISE.—The promise of the lessees to replace the machinery in the destroyed kiln was a sufficient consideration for the promise of the defendant to rebuild it.

ID.—AMENDED ANSWER—CURE OF ERROR.—An error in the refusal of the court to file an amended answer after an immaterial amendment to the complaint allowing a special traverse of each of the material allegations of the original complaint was cured by subsequently allowing an amended answer after the amendments to the complaint were filed, in which he substantially denied all the allegations of the whole complaint as amended.

ID.—SUPPORT OF FINDINGS.—*Held*, that the evidence fully warrants the findings of the court for the plaintiffs.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

C. M. Jennings, for Appellants.

Edward J. McCutchen, Page, McCutchen & Eells, and Page, McCutchen, Harding & Knight, for Respondents.

McFARLAND, J.—Judgment went in the court below for plaintiffs, and the defendants appeal from an order denying their motion for a new trial. There is no appeal from the judgment. The action was originally against Francis T. Eisen to recover damages against him for his failure to replace a certain kiln used for drying oats and other grains, which kiln had been in a house leased by him to plaintiffs and their predecessors, and had been destroyed by fire. During the pendency of the action Eisen died, and his executor and executrix were substituted as defendants. The transcript presents the difficulty of discovering what questions are involved rather than the difficulty of determining the questions when discovered.

The court, in addition to formal matters, found these facts: On October 7, 1887, said Eisen leased to the present plaintiff Frey and Jesse Newbauer and J. C. Holloway, who then composed the firm of the Monarch Milling Company, and were engaged in the business of manufacturing meals of various kinds out of wheat, oats, and other grains, certain premises in San Francisco consisting of floors and parts of floors in the building on Stevenson Street known as numbers 12, 14, and 16, together with certain machinery therein owned by Eisen and used for milling purposes, and a kiln for drying situated on the third floor. The said lessees took possession and began therein their said business. Afterwards Holloway sold and conveyed all his interest in the lease and business to the said Frey and Newbauer, and at other times there were sales of interests in the lease and business to and from other parties, until finally the plaintiffs Frey and Hoffman and Schwabacher became and remained the owners and continued to conduct the business. On the twenty-first day

of September, 1887, without any fault of plaintiffs, a fire occurred which injured and damaged said building and property and entirely destroyed the kiln and some of the machinery. Immediately after the fire Eisen agreed with plaintiffs, and promised them, to repair the premises and rebuild the kiln if plaintiffs would repair and rebuild the parts of the machinery which had been damaged and destroyed by the fire, which plaintiffs promised to do. Plaintiffs complied with their part of this contract and replaced said machinery; but Eisen neglected and refused to rebuild said kiln or to build any kiln. The kiln was necessary to the proper conduct of said business of plaintiffs, and they were damaged by Eisen's refusal to rebuild the same in the sum of \$756.47, for which amount judgment was rendered against defendants. The evidence fully warrants these findings. The order denying the new trial must therefore be affirmed, unless it should be reversed upon some of the special grounds suggested by appellants; and we do not think that any of such grounds are tenable. We will notice such of them as seem to call for any discussion.

Appellants attack the sufficiency of the complaint; but as to this matter it is enough to say that the sufficiency of a complaint can be considered only on an appeal from the judgment, and is not reviewable on an appeal from an order denying a motion for a new trial. (*Bode v. Lee*, 102 Cal. 583, and cases there cited.)

It is contended that the court erred in overruling appellants' objections to the testimony of respondents' witness J. C. Holloway, the objection being that he was an assignor of respondents, and therefore disqualified as a witness under section 1880 of the Code of Civil Procedure, which provides that an assignor shall not be a witness "upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person." But the objection was not good, because Holloway had transferred all his interest in the lease and business before the fire; and as the cause of action arose upon a contract made after the fire to which he was not in any way a party, he was not an assignor of the "claim or demand" sued on.

We do not see any merit in the contention that the action was barred by the statute of limitations. There is no claim

that the action was not originally brought in time, as it was commenced within one year after the alleged cause of action accrued. But afterwards the respondents, by leave of court, amended the complaint by inserting after the averment of appellants' promise the words "for a valuable consideration," and it is contended that by this amendment a new cause of action was averred. It is obvious, however, that the amendment referred entirely to the cause of action originally alleged, and was merely a statement of something existing at the time of the accruing of that cause of action and being part of it, and which the pleader thought proper to add in order to make the complaint more full. No new cause of action was set up in the amendment. And the same may be said of the other amendments—one striking out the words "and Holloway," and another striking out the allegation that defendant "repaired said premises and property" except the kiln.

There is no material variance between the cause of action stated in the complaint and the cause of action upon which the judgment rested. The cause of action alleged was the promise of Eisen to rebuild the kiln and his failure to do so; and upon these facts the judgment was rendered.

The contention that the claim or demand presented to the executor after the death of Eisen was insufficient, and was different from the cause of action stated in the complaint, is not maintainable. The claim presented was very full, and stated as the ground of the demand the promise of Eisen to rebuild the kiln, and his failure to do so, as alleged in the complaint.

The promise of respondents to replace the machinery and their fulfillment of that promise constituted a sufficient consideration for Eisen's promise to rebuild the kiln.

After plaintiffs had amended by striking out the words "and Holloway," the defendants moved for leave "to amend their answer by making a special traverse of each of the material allegations in plaintiffs' complaint." The motion was denied, and appellants assign this ruling as material error. It is not necessary to inquire whether the court was right in holding that the original answer sufficiently set forth the defenses of defendants, and that therefore an amended answer was not called for, because it appears that after-

wards, and after all the amendments to the complaint had been made, defendants were allowed to file, and did file, an amended answer, in which they had an opportunity to deny, and did substantially deny, all the material averments of the complaint as amended. The defendants therefore could have availed themselves of any defense which they had and of the right to introduce evidence pertinent thereto; and they could not have been in any way prejudiced by the said ruling excepted to.

We see no other points calling for special notice. The merits of the case lie in the questions whether Eisen promised to replace the kiln upon the consideration that plaintiffs would replace the machinery, and whether plaintiffs were damaged by his refusal to do so, as found by the court; and each party had a fair opportunity to try those questions. And as there are no good reasons for disturbing the conclusions of the court below as to those questions, there is no ground for reversing the order appealed from.

The order denying a new trial is affirmed.

Henshaw, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[S. F. No. 3056. Department One.—November 9, 1904.]

ALBERT LIMBERG, Appellant, v. GLENWOOD LUMBER COMPANY, Respondent.

NEGLIGENCE—MASTER AND SERVANT—KNOWLEDGE OF DEFECTIVE APPLIANCES—ASSUMPTION OF RISK—NONSUIT—LAW OF CASE.—In an action by a teamster for damages for negligence of the master in failing to furnish proper appliances, in which a nonsuit was granted, and in which a second appeal was taken, where the evidence is the same as was considered upon a former appeal, upon which a judgment in favor of plaintiff was reversed upon the ground that plaintiff's evidence showed that he had, with the full knowledge of defects in the appliances, voluntarily continued to work therewith for several months prior to the accident, and assumed the risk of working therewith, the decision upon the former appeal is the law of the case.

ID.—DEFECTS ALLEGED—EMPLOYMENT AS TEAMSTER—ELEMENT OF NEGLIGENCE NOT WITHIN ISSUES.—Where the plaintiff was employed as a teamster in hauling lumber, and the only defects complained of were that the lines furnished were too short and that there was no seat on the wagon, evidence of a new element of negligence not within the issues, in not having a brake on the wagon, of which the plaintiff had the same knowledge as of the other defects, cannot be considered as affecting the question of nonsuit or the law of the case.

ID.—EVIDENCE—CUSTOMARY APPLIANCES—IMMATERIAL RULING.—The exclusion of evidence as to whether it was customary in the business of hauling lumber with four horses to have a wagon equipped as this wagon was, and with lines such as were here used, was material, if at all, only on the question of negligence, and, if competent, such exclusion could not prejudicially affect the plaintiff's rights, where it is determined that he assumed the risk of the appliances used. In such case it is immaterial whether or not there was in fact negligence on the part of the defendant.

ID.—EVIDENCE PROPERLY EXCLUDED—QUESTIONS ASKED PLAINTIFF.—A question asked the plaintiff as to whether or not, if he had lines long enough to sit back on the load, he would have been pulled off by the lines, which went at most to the question of negligence and the cause of the accident, was properly excluded. It was also proper to exclude a question asked plaintiff as to what use he would have made of a brake if there had been one on the wagon.

APPEAL from an order of the Superior Court of Santa Clara County denying a new trial. A. L. Rhodes, Judge.

The facts are stated in the opinion of the court.

J. C. Black, for Appellant.

Joseph R. Patton, for Respondent.

ANGELLOTTI, J.—This is an action for damages for personal injuries suffered by plaintiff while in the employ of defendant as a teamster, the claim of the plaintiff being, that such injuries were caused by the negligence of his employer, in that the appliances furnished him with which to do the work were defective. There have been two trials of the case. The first trial resulted in a judgment for plaintiff. On appeal by the defendant from such judgment and an order denying its motion for a new trial, the judgment and order were reversed and the cause remanded. (*Limberg v. Glenwood Lumber Co.*, 127 Cal. 598.)

Upon this trial the court granted defendant's motion for a nonsuit, and judgment was entered accordingly. The plaintiff moved for a new trial, which was denied, and he appeals from the order denying his motion for a new trial. He contends that the trial court erred in granting the motion for a nonsuit, and also in excluding certain testimony.

1. We are of the opinion that the ruling of the trial court upon the motion for nonsuit is sufficiently specified as an error of law in the statement on motion for a new trial to enable us to review it. That ruling was, however, undoubtedly correct. Upon the former appeal it was held, after a full discussion of the evidence, that the defendant's motion for a nonsuit made on the trial should have been granted, upon the ground that the evidence for the plaintiff clearly showed that, even if it were conceded that the defendant was negligent in not furnishing proper appliances, the plaintiff had, with full knowledge of the defects, voluntarily continued to work therewith for several months prior to the accident, and that he had thus assumed the risk of working therewith.

The alleged defects complained of were, that the lines furnished for the driving of the horses were too short, and that there was no seat on the wagon.

It is unnecessary to discuss the evidence given on behalf of plaintiff on the second trial, further than to say that it is substantially the same, so far as is material to the question of the assumption of the risk of working with the appliances furnished is concerned, as the evidence given on the first trial and discussed by this court on the former appeal. The decision of this court upon such appeal as to the effect of this evidence has become the law of this case, and is binding upon this court on this appeal.

It is suggested by appellant that the evidence on the second trial showed "a new element of negligence of defendant in not having a brake on the wagon." This was an "element of negligence" not embraced within the issues made by the pleadings, the complaint specifying with great particularity the only negligence complained of—viz., that the lines were too short, and that the wagon was without a seat. The plaintiff's knowledge as to the brake was apparently the same as his knowledge as to lines and seat, for he testified: "There

never was a seat on that wagon nor a brake." We are unable to see how the evidence as to the want of brake in any way affected the question as to whether plaintiff had assumed the risk of working with the short lines on a wagon without a seat.

2. As to the rulings of the court sustaining objections to certain questions asked by defendant, we find no warrant for disturbing the judgment or order denying a new trial.

The question asked the witness Sanor, as to whether it was usual or customary in the business of hauling lumber with four horses to have a wagon equipped as this wagon was, and with lines such as were here used, was material, if at all, only to the question of negligence, and if it be conceded that the proposed evidence was competent, the ruling of the court rejecting the same could not have prejudicially affected plaintiff's rights, as it could not affect the determination of the question as to whether plaintiff had assumed the risk of working with the appliances furnished. It being determined that he did assume such risk, it is immaterial whether or not there was in fact negligence on the part of defendant. The same may be said as to the question asked the plaintiff as to whether or not, if he had had lines long enough to sit back on the load, he would have been pulled off the load by the lines, which went at most to the question of negligence and the cause of the accident. There was, however, no error in the ruling of the court sustaining the objection to this question.

We are unable to see the materiality of the question asked the plaintiff as to what use he could have made of a brake, if there had been one on the wagon.

The order is affirmed.

Shaw, J., and Van Dyke, J., concurred.

[S. F. No. 3825. In Bank.—November 9, 1904.]

WILLIAMS, BELSER & CO., Appellants, v. CARRIE L. ROWELL, Respondent.

**CONSTRUCTION OF PART OF SEWER—PRIVATE CONTRACT BY LOTOWNERS—
CONSTRUCTION OF CODE—ENFORCEMENT OF LIEN—JURISDICTION.—**

A system of sewers is an improvement to lots within the sewer district, and where the lotowners within part of a sewer district established by a town made a private contract for the construction of the sewers according to the proper plans and specifications of the town, in proportion to frontage on their lots, the contractor has a lien under section 1191 of the Code of Civil Procedure upon each lot for the price which the owner has agreed to pay therefor, which the court has jurisdiction to enforce, regardless of the amount thereof. [Shaw, J., and Angellotti, J., dissenting.]

ID.—PLEADING—AMBIGUITY AND UNCERTAINTY—GENERAL DEMURRER.—
Ambiguity and uncertainty in a pleading are not available upon general demurrer, and can only be taken advantage of by special demurrer.

APPEAL from a judgment of the Superior Court of Alameda County. W. E. Greene, Judge.

The facts are stated in the opinion of the court.

J. C. Bates, for Appellants.

John W. Stetson, and James G. Quinn, for Respondent.

BEATTY, C. J.—In this case the superior court sustained a general demurrer to the complaint, and, upon the plaintiffs declining to amend, entered a final judgment for the defendant, from which plaintiffs appeal. It appears from the complaint that the board of trustees of the town of Emeryville adopted a plan or system of sewers for the town, and that the plaintiffs entered into a written contract with the defendant and other lotowners by which they agreed to furnish the material and construct the whole system, together with the necessary Y branches, manholes, lampholes, etc., according to the plans and specifications of the town engineer as approved by the board of trustees, and to the satisfaction of the engineer and said board; that the defendant and other

owners of lots upon their part agreed in consideration of the performance of this contract to pay to the plaintiffs the sum of forty-five cents per front foot, according to their frontages set down with their signatures to the contract and representing the amounts of their individual frontage directly along the lines of the proposed sewers. It was stipulated that said rate of forty-five cents should include all manholes, lamp-holes, inspectors' and engineers' fees, and all incidental expenses, and also all work on crossings. But the respective lotowners were to pay for as many Y branches as they indicated in connection with their signatures, at the rate of a dollar and fifty cents each. The defendant was the owner of a lot fronting 129.57 feet on Auburn Avenue and the same length on Lulu Avenue, and she as the owner of said lot agreed to pay for the work done under the contract, \$58.18 for 129.6 feet front at forty-five cents, and \$4.50 for three Y branches, or a total amount of \$62.68. The plaintiffs duly performed their contract, but defendant has failed to pay, and they seek in this action to enforce a lien against her lot for her share of the agreed price of the work and for costs, etc.

Defendant's demurrer was general, for want of facts and lack of jurisdiction, and if it was rightly held by the superior court that plaintiffs had no lien to be foreclosed, the amount claimed under the contract was too small to give the superior court jurisdiction. The main, and in fact the only, question, therefore, which we have to decide is whether there was a lien. It is true the respondent makes some claim that the complaint does not show that the sewer was constructed in front of her lot, and it is true that in this respect the complaint is ambiguous and uncertain, but this was a defect that should have been pointed out by special demurrer. As against a general demurrer for want of facts, we think the complaint may be held to show with sufficient certainty that the sewer was laid for 129.6 feet in front of the defendant's lot, and that three Y branches were placed in that part of the sewer for her accommodation. (Though as to this matter of Y branches it is immaterial whether the complaint shows a lien or not; they were separately provided for by a severable clause in the contract, and if the complaint established a lien for that part of the contract price determined by the frontage, it was error to sustain the demurrer.)

We think that the superior court erred in holding that there was no lien. By section 1191 of the Code of Civil Procedure it is provided that "Any person who, at the request of the reputed owner of any lot of any incorporated city or town, grades, fills in, or otherwise improves, the same, or the streets or sidewalks in front of or adjoining the same, or constructs any areas, or vaults, or cellars, or rooms, under said sidewalks, or makes any improvements in connection therewith, has a lien upon said lot for his work done and materials furnished."

A system of sewers is an improvement to the lots within the sewer district. This is clearly recognized in the provisions of the Vrooman Act relating to sewers. From its first enactment of 1885 (Stats. 1885, p. 161, sec. 24) through all its amendments (Stats. 1887, 1889, 1891, 1895, *passim*), city councils have been fully empowered to order the construction of sewers, in defiance of any protest of property-owners and at their expense. They have power to define sewer districts, including the property which in their judgment will be benefited,—i. e. enhanced in value by the proposed work,—and to assess the whole cost, including all incidental expenses, upon the property so benefited, thereby creating a lien upon each lot for the amount of its assessment. (Stats. 1885, p. 162, sec. 27.) The power to subject each lot within an assessment district to a lien for its due proportion of the cost of street or sewer work rests solely upon the assumption that the lot is improved,—i. e. enhanced in value in an amount at least equal to its assessment,—and accordingly it is held that the lot alone is liable, the owner being free of any personal liability. (*Taylor v. Palmer*, 31 Cal. 254.) There is no difference in this respect between the construction of a sewer and the improvement of a street, except in the wider latitude of discretion given to the city council in determining what property will be benefited, and the mode of apportioning the cost. Assessment according to frontage in this and other cases is only a mode more or less equitable, according to circumstances, of making the apportionment, but, whatever the mode adopted, the several assessments, if lawfully made, represent in legal contemplation the improvement to the several lots, and are a lien thereon.

Now, in this case it appears that the trustees of Emeryville

had adopted a system of sewers *for the town* upon plans and specifications recommended by the town engineer. This manifested their intention to order the work, let contracts, and assess the cost of the whole work with all its incidents ratably upon the lots within the town. In this situation the defendant and other lotowners agreed to assess themselves for their ratable share of the expense. Knowing that they would be subjected to no personal liability if the improvement was carried out by proceedings *in invitum*, but that their lots would be charged with the expense according to an assessment to be made, they voluntarily entered into an agreement by which they assessed themselves for what each must have deemed his fair share of the expense, or, in other words, the amount of the improvement to his particular lot. It is true that it is not shown that all lotowners in the town joined in this agreement, and it is highly probable that some of them did not. In cases of this kind there are generally found a few individuals who are willing to shift their own burdens to other shoulders, and no doubt the parties to this contract took that into consideration. They may be trusted, however, to have concluded that on the whole it would cost each of them less to have the work done under this contract than to have it carried out under compulsory proceedings by the board of trustees. They were looking out for their own interests, and no doubt they took proper care of them. They secured the improvement of their lots upon terms which they voluntarily accepted in place of the terms which they apprehended might be imposed upon them.

This being so, they are brought within the letter and spirit of the law above quoted. The plaintiffs improved their lots at their request, and their claim of lien is for no more than the agreed value of the improvement. The fact that the contract price included the general and incidental expenses of the system, as well as the cost of the branch sewers in front of the respective lots, is no impeachment of this statement. When a system of sewers is constructed under the orders of a city council in the usual way, all these expenses are apportioned to the several lots and become a part of the whole amount secured by the lien. And justly and reasonably so. A branch sewer laid in front of a lot but unconnected with a main or outfall sewer would be simply a nuisance. To make

it a real improvement it must be connected with other parts of the system, and the main sewers must be furnished with the means of cleansing, ventilation, and inspection, such as manholes, lampholes, etc. Street-crossings must also be restored where the sewers are laid, and the labor and services of the official engineers and inspectors must be compensated by the contractor. These costs, appertaining to the whole system, and essential to its existence and efficiency, must be apportioned, and whether they are assessed by the superintendent of streets in the usual way or apportioned by voluntary agreement of the lotowners according to frontage or by some other method, the share apportioned to each lot is to be deemed a part of the price of the improvement to that lot, and if so it is a lien thereon.

The complaint, in our opinion, sustains the claim of lien, and the superior court had jurisdiction to enforce it.

The judgment is reversed.

Henshaw, J., McFarland, J., and Lorigan, J., concurred.

SHAW, J., dissenting.—I dissent. Section 1191 of the Code of Civil Procedure is a part of the chapter of that code relating to mechanics' liens. The provisions conferring a lien upon a lot for work done in connection therewith in the adjoining street were first incorporated into this section by the amendment made in 1885. There is much ground for the contention that there was no intention by this amendment to give a lien upon the lot for any work except for private improvements made for the benefit of the particular lot. It is a great stretch of construction to hold it applicable to public improvements such as a public sewer composing part of a general system for the town or city. But for the purposes of this case it may be conceded that in a proper case, where the owner of a lot requests the construction of a public sewer in the street abutting upon the lot, the lot would, under this section, be subject to a lien for its proportional part, according to frontage, of the total cost of the sewer constructed at the owner's request. If by the complaint in this action it had been made to appear either that all of the owners of lots fronting upon the proposed system of public sewers had joined in the contract employing the plaintiffs to construct

the sewer, each agreeing to pay his proportion of the cost of the entire work, or that the defendant and the other property-owners who did join in the contract had each agreed to pay only that portion of the entire cost of the system which would be properly chargeable to his particular lot upon an apportionment of the total cost according to frontage, then it would follow, under this construction of the section, that each lot would be subject to a lien for such proportional amount of the cost. But that is not this case. It is alleged that the defendant and other property-owners employed the plaintiffs to construct the sewer according to the plans and specifications adopted by the town trustees, and to the satisfaction of the town engineer and board of supervisors, but it does not appear that the property-owners thus employing the plaintiffs comprised all the owners of lots abutting upon the proposed system of sewers. It further appears that each agreed to pay for the construction of the proposed system a sum equal to forty-five cents per front foot upon his particular frontage, but it is not alleged that this sum was the proportional part of the entire cost which would be chargeable to the particular lot if an apportionment were made according to frontage.

There can be no presumption that such was the case. It must be conceded that if these facts are necessary to give the plaintiffs a lien for the amount they claim, it was incumbent upon them to show them by proper allegations in the complaint. The result is, that, so far as appears from the case made by the complaint, the lien is imposed upon the lot of the defendant for a portion of the total cost of the system of sewers, which bears no relation whatever to the cost of the portion of the sewer in front of the lot, or to its proportional part of the entire cost estimated according to frontage. The mere fact that the contract provided for a certain amount per front foot is of no consequence to the proposition. The sum agreed to be paid by each was entirely arbitrary, and, so far as it has any bearing upon the merits of the question, it could as well have been determined by any other method or by stating the exact sum which each agreed to pay, without regard either to frontage or to the total cost. In any system of sewers for a town there would usually be numerous branch sewers entering into the main sewer at different points along

the line and intended to serve the purpose of drainage for lots fronting upon the side streets. It does not appear from this complaint whether the defendant's lot abutted upon the street in which the main sewer was laid or upon some side street upon which only a branch was laid. But in either case branch sewers which did not abut upon this lot would be of no benefit whatever to the lot. As there is nothing to show that such was not the case, and as under ordinary circumstances there would be such branch sewers, it must be presumed in this case that such were in existence. A lien is therefore charged against the defendant's lot for a sum, of which a part at least is for that part of the sewer made for the benefit of other lots, and for the city in general. The effect of the decision is, that in a case where a few lotowners contract for the construction of a public sewer or system of sewers for the town, and agree to pay some part of the contract price there will be a lien imposed by this section, in favor of the contractor, upon the lots owned by each contracting owner, for the amount which he has agreed to pay upon the contract price, regardless of whether such amount is or is not the ratable proportion of the total cost chargeable to his lots, and regardless of whether it really goes in part to pay for portions of the sewer beneficial solely to other lots than his own. It would thus practically impose upon his lot a mortgage for a benefit conferred upon another. In my opinion, section 1191 was not intended to have such effect.

In so far as the majority opinion assumes that the amount each owner agreed to pay in this case was his ratable share of the whole expense, apportioned by frontage, it is without support from the facts alleged.

Angellotti, J., concurred.

[Sac. No. 1078. In Bank.—November 9, 1904.]

**F. WILLIAM GABRIEL, Respondent, v. BANK OF SUI-
SUN, Appellant.**

**MASTER AND SERVANT—AGREED WAGES—CONTINUANCE AFTER TERM—
PRESUMPTION OF RENEWAL.**—Where a master and servant have
agreed upon a certain rate of wages for a fixed term, and the par-
ties continue the relation of master and servant after the term,
they are presumed, under section 2012 of the Civil Code, to have
renewed the agreement for the same wages and term.

**Id.—EMPLOYMENT BY BANK FOR YEAR AT MONTHLY SALARY—RENEWAL
—FINDING—CONFLICTING EVIDENCE.**—Where the plaintiff was em-
ployed by the defendant bank as its cashier and bookkeeper for one
year at a monthly salary, and the plaintiff's testimony was in ac-
cordance with the presumption of continuance at the same salary
for succeeding years until he was discharged pending a succeeding
year, in an action for damages for breach of the contract a finding
in favor of the plaintiff upon conflicting evidence cannot be dis-
turbed upon appeal.

Id.—MINUTES OF DIRECTORS UNKNOWN TO PLAINTIFF.—The minutes of
the directors of the defendant bank unknown to the plaintiff as one
of the contracting parties cannot be considered as conclusive evi-
dence of the terms of the contract for further employment.

Id.—RESCISSION—SUPPORT OF FINDING.—Where the evidence was con-
flicting as to whether the contract of employment was rescinded
after two months' employment in the last year by mutual consent,
but there was sufficient evidence to support a finding to the con-
trary, the finding must stand.

APPEAL from a judgment of the Superior Court of Solano
County and from an order denying a new trial. A. J.
Buckles, Judge.

The facts are stated in the opinion of the court.

George A. Lamont, for Appellant.

Gregory & Gregory, for Respondent.

SHAW, J.—This is an action to recover one thousand dol-
lars as damages for a breach of contract of employment of
the plaintiff by the defendant. The defendant appeals from
the judgment and from an order denying its motion for a new
trial.

The court below finds that the defendant employed plaintiff as its assistant cashier and bookkeeper on or about January 1, 1899, for the year 1899, at a salary of one hundred dollars per month, payable monthly, and that plaintiff entered the service of defendant under said employment, remained in its said service until March 1, 1899, was then wrongfully discharged by the defendant, and was not allowed to remain in said employment for the remainder of the year 1899, whereby he was damaged in the sum of one thousand dollars, for which sum the judgment was rendered.

It is contended that the evidence does not support the finding that the plaintiff was employed by the year for the year 1899. This contention, however, cannot be sustained. The plaintiff testified that he was employed as bookkeeper and assistant cashier in July, 1895, and was continued in that employment to the end of that year "at a salary of \$100 a month—\$1,200 a year." He then proceeds as follows: "I was employed after that at the end of December, 1895, in the same capacity for the year 1896, at the same salary, \$1,200. I continued in that employment during the whole year 1896. I was again employed December, 1896, *for the year 1897* in the same capacity, at the same salary. I remained in the employment during the year 1897. I was again employed at the end of 1897 for 1898, in the same capacity, at the same salary, payable monthly. I continued in that capacity during the year 1898.—Q. Did you continue in the service of the bank in that capacity any longer than 1898?—A. I did, two months, January and February, 1899,"—and further, that he then quit the employment because he was discharged by the defendant. By the provisions of section 2012 of the Civil Code, "Where, after the expiration of an agreement respecting the wages and the terms of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service." The above testimony sufficiently shows that the plaintiff had been employed for the year 1898 at an annual salary of twelve hundred dollars, payable monthly, and that he continued in that employment during the first two months of 1899. From this the presumption arises, under the section quoted, that the employment was renewed for the same wages and term as for the previous year. There was evidence con-

trary to this, but we cannot interfere with the finding of the court because of the conflict. The minutes of the meeting of the directors of the corporation cannot be considered as conclusive evidence of the terms of the contract where, as in this case, the plaintiff, one of the contracting parties, had, as he testified, no knowledge thereof.

The appellant further contends that the evidence shows that the contract of employment, if made for the year 1899, was rescinded after two months by mutual consent. It is sufficient to say on this point that while there was some evidence tending to show a rescission, there was sufficient evidence to the contrary to justify the finding of the court.

The judgment and order are affirmed.

Angellotti, J., Henshaw, J., and Beatty, C. J., concurred.

McFARLAND, J.—I dissent. I do not think there is any support in the evidence for the finding that the plaintiff was employed by the year for the year 1899.

[S. F. No. 2973. Department One.—November 10, 1904.]

SARAH BLUNT, Appellant, v. THE FIDELITY AND CASUALTY COMPANY, Respondent.

INSURANCE—ACCIDENT POLICY—CONDITION FOR RETURN OF PREMIUM—FATAL INJURY TO INSURED WHILE INSANE.—Under a policy of accident insurance, providing that if the death of the insured shall result from an injury within ninety days from the time the injury was received the company would pay the whole amount insured to the surviving wife, but containing a condition that only the amount of the premium paid should be returned if an "injury was received by him while insane," the company is only liable for a return of premium, where the assured, while insane and confined in the Mendocino State Hospital, fell against a steam radiator and received injuries from which he died within ninety days.

Id.—CONDITIONS IN POLICY—ASSENT OF ASSURED.—The company may insert conditions in the policy not mentioned in the application. If not satisfactory, the contract, consisting of the application and policy, may be rescinded; but where the policy containing new conditions is accepted without objection, and renewed, the conditions

must be deemed assented to, and the policy cannot afterwards be avoided by the assured or the beneficiary.

Id.—CONSTRUCTION OF POLICY.—The court in construing an insurance policy resolves every ambiguity and uncertainty in favor of the assured; but where the words are clear and free from uncertainty, and the meaning plain, the contract as made by the parties is beyond the power of the court to change by a forced construction.

Id.—PURPOSED OMISSION OF WORD “INTENTIONALLY” IN CLAUSE AS TO INSANITY.—The condition in the policy providing that “in case of injuries fatal or otherwise *intentionally* inflicted upon himself by the assured, or inflicted upon himself or received by him *while insane*, the measure of the company’s liability shall be a sum equal to the premium paid,” the word “intentionally” expressed in the first clause must be deemed to have been purposely omitted from the second clause. The policy makes the insane condition, and not the volition of the assured, the test of non-liability under the second clause, except for the premium paid.

APPEAL from a judgment of the Superior Court of Alameda County. John Ellsworth, Judge.

The facts are stated in the opinion of the court.

H. V. Morehouse, and J. E. Alexander, for Appellant.

A. E. Shaw, for Respondent.

SHAW, J.—The plaintiff appeals from the judgment. The suit is upon a policy of insurance, of the kind usually designated as an accident policy, issued by the defendant to John P. Blunt for the term of twelve months. It provided that if death should result from an injury within ninety days from the time the injury was received, the defendant would pay to the wife of the insured, if she survived him, the sum of five thousand dollars. The fourth clause of the policy was as follows: “4. In case of injuries fatal or otherwise intentionally inflicted upon himself by the assured, or inflicted upon himself or received by him while insane, the measure of this company’s liability shall be a sum equal to the premium paid, the same being agreed upon as in full liquidation of all claims under this policy.” At the end of twelve months the policy was renewed for the same period, and at the end of that time it was again renewed. During the last year of the insurance John P. Blunt became insane and was committed to the Mendocino State Hospital. During the term of insurance, and

while insane, he fell against a steam radiator in the hospital and thereby received injuries from which, within ninety days thereafter, he died. The plaintiff is the surviving wife of the assured. Before the action was begun the defendant tendered her the full amount of the premium paid, and in its answer it offered to allow judgment for that sum in favor of the plaintiff. The court found these facts, and gave judgment in favor of the plaintiff for the sum tendered and against the plaintiff in favor of the defendant for its costs.

In contracts of insurance, as in other contracts, the rights of the parties are determined from the terms of the contract, so far as it is lawful. The contract here in question consisted of the application for insurance made and delivered by the assured to the defendant and the policy of insurance made and delivered by the defendant to the assured. It cannot be conceded that the company was not at liberty to insert conditions in the policy which were not mentioned in the application. The application contained the affirmative stipulations and warranties made by the assured, and the policy contained the stipulations and limitations made by the insurer. The two together constitute the contract. If the policy of the company, which was issued by the company upon receipt and approval of the application, had contained any clause to which the assured did not agree, he, of course, would have been at liberty to reject it, and either demand a rescission and return of the premium paid, or insist upon a policy without the clause to which he did not assent. But when he received the policy and accepted it without objection, and especially when, as the record here shows, with the policy in his possession, he twice renewed it for an additional year, neither he nor the beneficiary can with good reason claim that there is anything contained in it to which he did not fully consent and agree. The fourth clause above quoted is not unlawful, and it cannot be eliminated on the ground that it is not expressly referred to in the application.

The effect of this clause is, that the defendant did not agree to insure the policyholder against injuries from accidents received by him during such part of the time covered thereby as the assured should be insane, except to the amount of the premium paid, and this regardless of the question whether the injuries were inflicted by himself, intentionally

or otherwise, or were received by him from some other cause.

Insurance during such insanity, except to that extent, was simply not a part of the contract, and the agreement in that contingency was, that the company should be liable only for a sum equal to the premium paid. Language could not express this idea more clearly than it is expressed in the policy. The courts have always construed in favor of the assured every ambiguity and uncertainty in contracts of insurance. But where the words are clear and free from uncertainty and the meaning plain, the contract as made by the parties is beyond the power of the courts to change by a forced construction. There was good reason for the insertion of the clause. A sane man will naturally and instinctively protect himself from injury, while if insane he might unconsciously expose himself thereto. It is to be presumed that in fixing the amount to be paid as a premium the company took into consideration its proposed exemption from full liability during such insanity, if it should occur, and reduced the premium accordingly. The assured received the benefit of this clause in the reduced amount of the premium, and hence the contract cannot be deemed inequitable or unfair.

The appellant contends that the fourth clause should be construed by interpolating the word "intentionally" a second time, making it read thus: "In case of injuries fatal or otherwise intentionally inflicted upon himself by the assured, or *intentionally* inflicted upon himself or received by him while insane," etc. It is obvious that this would be an unfair and forced construction. The natural inference from the context is, that the element of intent was designedly omitted with respect to injuries happening to him while insane; so that in case of injury while he was insane, either consciously or unconsciously inflicted by himself, or received by him while in that condition, whether by reason of his consequent inability to avoid injury or from causes entirely apart from his insanity, the company should be liable only to the amount of the premium. The language used seems well adapted to convey this meaning, and it is apparent that the word "intentionally" was purposely omitted from the second clause in order to avoid any question on that point.

The cases holding that a provision exempting an insurance

company from liability if the assured shall commit suicide while insane does not give exemption where the suicide is the result of the insanity go upon the theory that the use of the term "suicide," or other similar description of the mode of death, implies a conscious and voluntary self-destruction, and not an act impelled by the insane delusion, and, in that sense, involuntary. They do not apply to this policy, which makes the insane condition, and not the volition of the assured, the test of non-liability.

The judgment is affirmed.

Angellotti, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[S. F. No. 3081. Department One.—November 10, 1904.]

J. W. BROWNING, Appellant, v. G. W. McNEAR, Respondent.

SALE—SACKS OF BARLEY—ACCEPTANCE AND RETENTION BY VENDEE—ACTION FOR PRICE—OFFSET—DAMAGE BY RAIN.—Whether a sale of specified sacks of barley be absolute or an executory agreement for the sale thereof, if the vendee, without protest or attempt to rescind, or offer to return the property, accepted, retained and used it, he cannot in an action for the agreed price offset damage caused by the rain to the barley delivered in the absence of a breach of warranty on the part of the vendors.

ID.—AFFIRMANCE OF SALE—ESTOPPEL OF VENDEE.—The acceptance and retention of the property sold by the vendee, in the absence of fraud or breach of warranty, is an affirmance of the sale which renders the vendee liable for the purchase money, and precludes him from alleging that the property is not of the character and quality called for by the contract.

LI.—REMEDY FOR BREACH OF WARRANTY.—Where there is a warranty, and it is discovered after delivery that there has been a breach thereof, the vendee may retain the property, and either sue independently for the breach or may plead it in reduction of damages in an action for the price.

ID.—IMPLIED WARRANTY—SALE BY SAMPLE—SELECTIONS BY VENDEE.—Though under section 1766 of the Civil Code there is an implied warranty, where the vendor makes a sale by sample, that the bulk

is equal to the sample exhibited, yet the sale is not by sample merely, because the vendor knew that the vendee, through his agent, had selected and taken samples after a personal inspection by his agent of the barley sold, unaccompanied by any act on the part of the vendor.

ID.—SOUND AND MERCHANTABLE CHARACTER—ACCESSIBILITY TO BUYER.

—An implied warranty that merchandise sold is sound and merchantable exists under section 1771 of the Civil Code only where the merchandise is inaccessible to the examination of the buyer. That section has no application where the merchandise was not only accessible to the buyer, but was in fact inspected and examined by him, through his agent, prior to the contract of sale.

ID.—AGREEMENT FOR PRESENT TRANSFER—QUESTION OF FACT—LIABILITY FOR SACKS NOT DELIVERED.

—The existence of an agreement for a present transfer of the sacks sold is a question of fact; and the liability of the vendor for the price of sacks not delivered depends upon the question of fact whether the sale was absolute and the title passed to such sacks.

ID.—DEFERMENT OF PAYMENT TO TIME OF SHIPMENT.

—The mere fact that payment for the grain was expressly deferred to the time of shipment, and was to be made only against the shipping receipts, does not conclusively establish a purchase as of that time, or that there was no prior agreement for a present transfer of the property.

ID.—LIMITATIONS UPON AUTHORITY OF AGENT NOT COMMUNICATED.

—In determining the question as to what the agreement of sale actually was, limitations as to the general transaction privately placed by defendant, upon the general authority of his agent, not communicated to the plaintiff, cannot, under the circumstances of this case, play any part.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Crane & Rutledge, and Adams & Adams, for Appellant.

The transaction was an absolute sale, under which the title passed to the vendee. (Civ. Code, sec. 1140; *Greenbaum v. Martinez*, 86 Cal. 459; *Lassing v. James*, 107 Cal. 349; *Newcomb-Buchanan Co. v. Cabell*, 10 Bush. 460; *Bradley v. Wheeler*, 44 N. Y. 495-502; *Groat v. Gile*, 51 N. Y. 431.) The vendee in such a sale must pay the price and take the risk of loss. (2 Kent's Commentaries, 492; *Mechens on Sales*, sec. 483; *Sanborn v. Benedict*, 78 Ill. 304; *Sedgwick*

v. *Cottingham*, 54 Iowa, 512; *England v. Forbes*, 7 Houst. 301; *Commonwealth v. Hess*, 148 Pa. St. 98;¹ *Hatch v. Oil Co.*, 100 U. S. 124; *Joyce v. Adams*, 8 N. Y. 201; *Willis v. Administrator*, 6 Dana, 48.) There being no breach of warranty, defendant could not offset the damaged condition of the goods in an action for the price. (*Correio v. Lynch*, 65 Cal. 273; *Coaply Iron Co. v. Pope*, 108 N. Y. 232; *Waeber v. Talbot*, 167 N. Y. 48;² *Reed v. Randall*, 29 N. Y. 358;³ *McCormick v. Sarson*, 45 N. Y. 265;⁴ *Beck v. Sheldon*, 48 N. Y. 373; *Dutchess County v. Harding*, 49 N. Y. 321; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Mason v. Smith*, 130 N. Y. 474; *Gilson v. Bingham*, 43 Vt. 410.⁵) Even if the contract was executory, the acceptance and retention of the goods would prevent an offset in an action for the price, where there was no fraud for breach of warranty. (*Coaply Iron Co. v. Pope*, 108 N. Y. 232; 21 Am. & Eng. Ency. of Law, 1st ed., p. 562, and notes; *Goodhue v. Batman*, 8 Me. 116; *Haase v. Nonnemacher*, 21 Minn. 486; *Defenbaugh v. Weaver*, 87 Ill. 132; *Carondelet Iron Works v. Moore*, 78 Ill. 69; *Locke v. Williamson*, 40 Wis. 377.) There was no sample furnished by the plaintiff, and where the buyer himself inspected the bulk, or had an opportunity to do so, there was no implied warranty either from sale by sample or under section 1771 of the Civil Code. (*Byrne v. Jansen*, 50 Cal. 624; *Bernard v. Kellogg*, 10 Wall. 383; *Selser v. Roberts*, 105 Pa. St. 242;⁶ *Hargous v. Stone*, 5 N. Y. 73.) An agent's authority cannot be limited by instructions not communicated. (*Whitton v. Sullivan*, 96 Cal. 480; *Stockton Combined Harvester Works v. Glens Falls Ins. Co.*, 98 Cal. 557.)

Chickering & Gregory, for Respondent.

The title did not pass until the shipping receipt reached the bank and the draft was paid, under the manifest intention of the parties. (*Blackwood v. Cutting Packing Co.*, 76 Cal. 212; *Ramish v. Kirschbraun*, 107 Cal. 659;⁷ *Dows v. National Exchange Bank*, 91 U. S. 618; *Bank of Rochester v. Jones*, 4 N. Y. 497;⁸ *Newcomb v. Boston etc. R. R.*, 115 Mass.

¹ 33 Am. St. Rep. 810.

² 82 Am. St. Rep. 712.

³ 86 Am. Dec. 305.

⁴ 6 Am. Rep. 80.

⁵ 5 Am. Rep. 289.

⁶ 51 Am. Rep. 205.

⁷ 9 Am. St. Rep. 199.

⁸ 55 Am. Dec. 290.

231; Benjamin on Sales, sec. 381.) Parties dealing with an agent are bound to inquire as to the extent of his authority. (*Mudgett v. Day*, 12 Cal. 139; *Blum v. Robertson*, 24 Cal. 127; *Mitrovich v. Fresno Fruit Co.*, 123 Cal. 379.) There was an implied warranty by sample (Civ. Code, sec. 1766), which the court found as a fact; and a sale by sample is a question of fact. (Am. & Eng. Ency. of Law, 2d ed., title "Implied Warranty," sec. 1228.) There was also an implied warranty that the barley was sound and merchantable, which warranty refers to the time of delivery. (*Shearer v. Park Nursery Co.*, 103 Cal. 418;¹ *Hughes v. Bray*, 60 Cal. 284; 28 Am. & Eng. Ency. of Law, p. 738; *Fisk v. Roseberry*, 22 Ill. 288; *Howard v. Hoey*, 23 Wend. 350;² *Kohl v. Lindley*, 39 Ill. 203.³)

ANGELLOTTI, J.—The plaintiff brought this action to recover \$6,632.27 alleged to be the balance due him for 21,277 sacks of barley sold and delivered by him to defendant, at the agreed price of 81¼ cents per one hundred pounds.

The defendant, who had received, accepted, and used 20,445 sacks thereof, claimed that the original transaction was no more than an executory agreement for the sale of the 21,277 sacks, at the price named, and alleged, by way of counterclaim, that "said barley was to be delivered to said defendant free on board barge at Eddy's Landing, California, in good order and condition, and equal to a sample theretofore shown said defendant by said plaintiff"; that defendant agreed to pay such price for the barley "when so delivered on board barge and in said condition"; that plaintiff delivered only 20,445 sacks; and that the portion so delivered "was, prior to the delivery of said barley upon said barge, seriously damaged by rain and other causes, so that when placed on said barge the same was greatly inferior in quality to said sample and was not merchantable barley"; and that by reason of said damaged condition of said barley, defendant suffered damages in the sum of five thousand dollars. He, therefore, asked that judgment be rendered against him for \$1,632 only.

The trial court found that the agreement between the parties was executory in its nature; that "it was understood by both parties that said grain was purchased and was to be

¹ 42 Am. St. Rep. 125.

² 89 Am. Dec. 294.

³ 35 Am. Dec. 572, and note.

paid for only against shipping receipts to be thereafter furnished by plaintiff"; that at the time of the transaction, October 9, 1899, the barley was in good order and condition and equal to samples which had been obtained by the purchaser; that both parties "understood . . . that the barley was being purchased by such samples"; that after October 9th, and before the shipping, it was damaged to the extent of \$4,182.96 by rain and mud, so that when it was delivered on board the barges it was not in good order and condition or equal to the samples referred to and was not merchantable barley; that 832 sacks, weighing 84,864 pounds, have never been delivered, but are still in plaintiff's warehouse.

The court deducted from plaintiff's claim the said sum of \$4,182.96 on account of the damage done by the rain to the barley delivered, and also the sum of \$689.52 for the 832 sacks still in plaintiff's warehouse, and gave judgment in his favor for \$1,759.79, interest, and costs of suit.

Plaintiff appeals from the judgment and from an order denying his motion for a new trial.

It will be seen from the foregoing that the question here is, except as to the 832 sacks of barley that are now in plaintiff's warehouse, whether or not the defendant, having accepted and retained and used the property, can in this action for the agreed price recover by way of counterclaim the amount of damage done to the property by rain between the time of the transaction, October 9, 1899, and the time of the loading of the property upon defendant's barges.

If the transaction of October 9, 1899, amounted to an absolute sale of the property, and the title thereto then passed to defendant, concededly plaintiff would in no way be liable for the damage.

It appears to be equally clear that if the transaction amounted only to an executory agreement of sale of a specific identified lot of barley, and the defendant, without protest, accepted, retained, and used the property, without attempt to rescind, or offer to return, he cannot in this action for the price offset the damage caused by the rain, in the absence of a breach of warranty on the part of the vendor. An acceptance of property by the vendee, in the absence of fraud or breach of warranty on the part of the vendor, renders him liable for the price agreed on, and precludes him from alieg-

ing that the property is not of the character and quality called for by the contract. This must necessarily be so, in view of the fact that by such action he affirms the sale, and in the absence of fraud his only possible cause of action against the vendor in this connection must arise from some undertaking on the part of the vendor as to the condition or quality of the property. The authorities appear to be without conflict as to this. (See 24 Am. & Eng. Ency. of Law, 2d ed., p. 1092, and cases there cited.) It is the law of this state, as it is generally elsewhere, that where there is a warranty, and it is discovered after delivery that there has been a breach thereof, the vendee may retain the property and bring an action for the breach of the warranty, or may plead the breach in reduction of damages in an action brought by the vendor for the purchase money. (*Snow v. Holmes*, 71 Cal. 142, 149; *Polhemus v. Heiman*, 45 Cal. 573, 579.¹) This rule, which is vigorously asserted by defendant, is not disputed by plaintiff, but its application to this case is dependent upon the question as to whether or not there was a warranty. If there was not a warranty, defendant was not entitled in this action to any offset on account of the damage caused by the rain to the property that he has accepted and retained, and this is true regardless of the question as to whether the transaction of October 9, 1899, amounted to an absolute present sale or only an executory agreement to sell. It was undoubtedly upon this theory that defendant alleged in his counterclaim that the "barley was to be delivered on board barge . . . in good order and condition and equal to a sample theretofore shown said defendant by said plaintiff."

Passing for the present the question as to whether or not the transaction of October 9th amounted to an absolute present sale of the barley, we shall consider the question as to warranty.

The superior court failed to find that there was any express undertaking on the part of plaintiff as to the condition of the property at the time of the transaction of October 9th, or as to what condition it should be in at the time of delivery. The evidence was without conflict to the effect that there was no such express undertaking on the part of plaintiff. In fact, the only evidence as to any express understanding on the sub-

¹ 13 Am. Rep. 204.

ject was that as to what occurred in the Bank of Colusa on October 9th, when the transaction was being there closed, where, according to the evidence of defendant's agent, Mr. Hickok, who negotiated the purchase, Mr. Harrington, an officer of the bank, said: "Mr. Browning, I suppose you sold this barley, so if it gets wet you would not be the loser," and Browning replied: "Yes, I have sold the barley to Mr. McNear; they have to look out for the weather," and Hickok said: "You need not be worrying about the weather because I think the barge will be there in a day or two and get it, and there is no indication of rain to-day." This evidence is more than corroborated by the evidence of Harrington and Browning, and it would be difficult under such circumstances to find that there was any express agreement or warranty on the part of plaintiff as to the condition in which the barley should be at the time of delivery. There is no claim that there was any express warranty as to its condition at the time of the transaction.

The question then remains as to whether there was any implied warranty. In this connection the defendant relies upon the finding of the trial court to the effect that at the time of the transaction, the barley was equal to samples which had been obtained by the purchaser, and that both parties understood that the barley was being purchased by such samples, as showing a sale by sample, and therefore an implied warranty, under section 1766 of the Civil Code, which provides, in accord with the general rule, that "One who sells or agrees to sell goods by sample, thereby warrants the bulk to be equal to the sample."

If we concede that the finding of the court above referred to is a finding that the plaintiff agreed to sell this barley "by sample," within the meaning of this section of the code, it must be held that the finding is without support in the evidence.

No sample of this barley was at any time exhibited or furnished by the plaintiff. The barley lay in plaintiff's yard, and the defendant's agent, Hickok, had examined it carefully, and on two occasions samples were taken for him by another party under his directions, and, so far as appears, these samples were taken without the presence of plaintiff and without his knowledge. It does not even appear that plain-

tiff ever saw the samples, Hickok stating that he was not positive that he ever showed them to him. All that plaintiff knew at the time of the transaction was, that it was customary for grain-buyers to sample for themselves all grain that was for sale; that Hickok had in fact selected and taken for himself samples of his barley, had sent a set of the same to his principal, the defendant, and retained a set in his office, and that McNear was acting entirely upon the *representations of his agent, Hickok*, to the effect that the samples taken and forwarded by such agent were in fact fair samples of the bulk of the barley. There was no act of any kind on the part of plaintiff conveying the slightest intimation on his part as to the correctness of the samples.

It would be a novel application of the rule of warranty arising from sale by sample to hold that a vendor is to be held responsible for a sample that he has never seen or exhibited, and concerning which he has made no representation, and which was selected and taken by the purchaser himself or his agent upon an inspection of the property. On a sale by sample the law implies the warranty that the bulk is equal to the sample upon the theory that by his acts and representations the vendor assures the vendee that such is the fact. It says that where one makes or agrees to make a sale "by sample," such act on his part is a representation that the bulk is equal to the sample, an affirmation that the specimen exhibited is a fair sample of the bulk of the commodity. (*Gurney v. Atlantic etc. Ry. Co.*, 58 N. Y. 364.) The sale by sample contemplated by the law is one the circumstances of which indicate something in the way of representation by the vendor, to the effect that a sample exhibited fairly represents the bulk. To constitute a sale by sample it must appear that the parties "contracted solely in reference to the sample exhibited, that they mutually understood that they were dealing with the sample as an agreement or understanding that the bulk of the commodity corresponded with it." (*Beirne v. Dord*, 5 N. Y. 95;¹ Benjamin on Sales, American note, 7th ed., p. 685; 15 Am. & Eng. Ency. of Law, 2d ed., p. 1227.)

While the question as to whether the circumstances of a transaction show a sale by sample is of course a question of fact for the court or jury, there must be evidence fairly suffi-

¹ 55 Am. Dec. 821, and note.

cient to support a finding of such a sale, or it cannot stand. Taking the evidence in this case in the light most favorable to defendant, it discloses no more than that the plaintiff knew that the defendant, through his agent, had personally inspected the barley, and for the purpose of enabling himself to properly exercise his judgment as to the quality thereof, had himself, through his agent, selected and taken samples, and that he was basing his conclusion as to the quality of the barley and its value upon the result of such inspection and the samples selected by himself. This mere knowledge of plaintiff as to the means used by defendant in determining as to the quality of the barley, unaccompanied by any act of his, could not make the sale one by sample. It was clearly a case where the defendant relied entirely upon his own examination, and took such precautions as he deemed essential to satisfy himself as to the quality of the property, without assistance of any kind from the vendor.

It is further contended that if there was not an agreement to sell by sample, there was an implied warranty that the goods should be sound and in merchantable condition when delivered upon the barge. The theory appears to be that this is the rule as to all executory sales, as distinguished from the rule applicable to executed sales. In this state the question as to whether there is an implied warranty must depend upon the provisions of our Civil Code. Section 1764 thereof provides that "Except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty." (See *Sutro v. Rhodes*, 92 Cal. 123.) Except for the section relative to sales by sample, admittedly no provision of that article of the code is applicable to this case, unless it be section 1771. That section provides that "One who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable." This section makes no distinction between executed sales and agreements to sell, and simply means what it says,—viz., that if at the time of the sale or the agreement to sell the merchandise is inaccessible to the examination of the buyer, the warranty that it is sound and merchantable will be implied. It can have no application to this case, for the simple reason that this barley was not only not inaccessible to the examination of the buyer, but was as a matter of fact in-

spected and examined by him, through his agent, prior to the making of the agreement. It must therefore be held that there was no express or implied warranty on the part of plaintiff, or any undertaking on his part as to the condition of the property at the time of delivery, and it follows that defendant was not entitled to set off against the agreed price the damage caused by the rain to such of the barley as was received and accepted and used by him.

Upon the question as to whether the transaction of October 9, 1899, amounted to an absolute sale of the barley, there is some doubt as to whether the evidence supports the finding of the court.

We do not deem it necessary to discuss this question, in view of the fact that the judgment and order must be reversed for the reasons already stated. Whether or not the parties, plaintiff and Hickok, representing defendant, then agreed upon a present transfer of the barley, is a question of fact, the determination of which may well be left to the superior court upon another trial. It is proper to say, however, that the mere fact that payment for the grain was expressly deferred to the time of shipment, and was to be made only as against shipping receipts, does not conclusively establish that the *purchase* was against shipping receipts only, or that there was no agreement for a present transfer of the property. It is also proper to say that in the determination of the question as to what the agreement actually was limitations as to the general transaction privately placed by defendant upon the general authority of the agent, and not communicated to plaintiff, cannot, under the circumstances of this case, play any part.

The *status* of the 832 sacks of barley that have not been taken by defendant from plaintiff's warehouse must depend upon the determination of the question as to whether the transaction of October 9, 1899, was an absolute sale. If the title thereto then passed to defendant, he is liable in this action for the agreed price; otherwise, not.

The judgment and order are reversed and the cause remanded.

Shaw, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[S. F. No. 2970. Department One.—November 11, 1904.]

HEATON-HOBSON ASSOCIATED LAW OFFICES (a Corporation), Appellant, v. GEORGE W. ARPER, Respondent.

ACTION FOR VALUE OF SERVICES—MUTUAL ACCOUNT—BALANCE DUE—PLEADING—ANSWER—GENERAL DENIAL—ACCOUNT STATED—FINDINGS WITHIN ISSUES.—In an action by the assignee of an attorney to recover the reasonable value of his services, in the amount of an alleged balance due upon a mutual, open, and current account, setting up the items claimed by the defendant in an unverified complaint, where the answer denied that defendant is indebted to plaintiff in the balance alleged, or in any sum, and pleaded an indebtedness of plaintiff's assignor to the defendant in a certain sum over and above all credits and offsets prior to the assignment, and that while the attorney was so indebted to defendant an account was stated between them in favor of the defendant in a specified sum—findings that the account was mutual, open, and current, that services of a value greater than the balance claimed were rendered by the attorney under a special agreement for payment out of a particular fund, after making a deduction which would exhaust the fund, and that there was no balance due from defendant to the attorney or to plaintiff, are within the issues raised by the answer.

II.—SUFFICIENCY OF ANSWER.—Under the general issue in *assumpsit*, anything which shows that plaintiff at the time of the commencement of his action had no cause of action may be taken advantage of; and any allegation in an answer which, if found true, necessarily shows that the allegation of the complaint as to the same matter is untrue, is a good traverse and sufficient as a denial.

ID.—CONSTRUCTION OF FINDINGS.—The court should not strain the language of a finding to make out a case of conflict; but it should be reconciled if it can be reasonably done. No such error or defect is here shown, in the answer and findings, as to justify a reversal.

APPEAL from a judgment of the Superior Court of Alameda County. S. P. Hall, Judge.

The facts are stated in the opinion of the court.

Welles Whitmore, O. G. Heaton, and Frank W. Sawyer, for Appellant.

F. W. Fry, and H. M. Owens, for Respondent.

VAN DYKE, J.—This is an appeal from a judgment in favor of defendant for his costs. The appeal is upon the judgment-roll without a statement or bill of exceptions.

The appellant's point on the appeal is, that the findings are not within any issue of the case.

After alleging the assignment of the claim in suit by Frank W. Sawyer to the plaintiff, and that said Frank W. Sawyer was a duly admitted and licensed attorney at law in this state, the complaint avers that at the city of Oakland, county of Alameda, state of California, the said Frank W. Sawyer, as such attorney at law, at the special instance and request of said defendant, performed services to and for said defendant in various actions and matters, the reasonable value of which was and is the sum of \$699, and that the last service performed was within two years of the bringing of the suit; that in the city and county and state aforesaid said Frank W. Sawyer purchased coal-oil of said defendant, and borrowed money of said defendant, all in the sum of \$160 and no more; that said account had by and between the said Frank W. Sawyer and said defendant was a mutual, open, and current account, and the balance due from defendant, on account of the same, is the sum of \$539, after deducting all just credits and offsets. Wherefore plaintiff demands judgment against said defendant for the sum of \$539, the said alleged balance, and costs of suit.

The answer "denies the said defendant is indebted to the said plaintiff in the sum of \$699, or in any sum," and by an amendment added to said answer it is alleged that on the nineteenth day of August, 1898, Frank W. Sawyer, plaintiff's assignor, was indebted to the defendant in the sum of \$16.90 over and above all claims and offsets, and that on said nineteenth day of August and subsequently, and while said Sawyer was so indebted to the defendant, an account was stated between said Sawyer and this defendant, and that upon such statement a balance was found to be due, and was due, from said Sawyer to the defendant, in the sum of \$16.90. The pleadings are unverified.

After preliminary finding in reference to the assignment and that said Frank W. Sawyer was an attorney at law duly

admitted and licensed, the court finds as follows: "At the city of Oakland, county of Alameda, state of California, said Sawyer, as such attorney, at the request of said defendant, performed services in various actions and matters, the reasonable value of which was and is the sum of \$645, and that the last service so performed was within two years next preceding the commencement of this action, and that a portion of said services of and to the value of \$600 was performed with the express understanding and agreement that it should be paid out of certain property or a certain fund, after first deducting the amount due said defendant from one Wilson, and that said fund or property has been and is insufficient to pay to said defendant the amount due him from said Wilson; that in the city and county and state aforesaid said Frank W. Sawyer purchased coal-oil of and borrowed money of said defendant, all in the sum of \$150, which is now due and payable.

"That said account had by and between said Frank W. Sawyer and said defendant was a mutual, open, and current account, and at the commencement of said action and at the time of said assignment there was no balance due from said defendant to said Frank W. Sawyer, or to the plaintiff in this action," and as a conclusion of law the court found that the defendant was entitled to judgment against plaintiff for his costs, and judgment was thereupon rendered accordingly.

The answer was sufficient to present an issue in the case. As said in *Young v. Rummell*, 2 Hill, 478,¹ quoted with approval by this court in *Meredith v. Santa Clara Min. Assn.*, 56 Cal. 183: "Although in point of form the plea of *non assumpsit* puts nothing in issue but the making of the promise, it has been long settled that nearly every defense is admissible under that plea which shows that there was not a subsisting cause of action at the time the suit was brought." And in *Burris v. People's Ditch Co.*, 104 Cal. 248, this court says: "It may be said, generally, that any allegation in an answer which, if found to be true, necessarily shows that the allegation of the complaint as to the same matter is untrue, is a good traverse, and sufficient as a denial." To the same effect is *Loftus v. Fisher*, 106 Cal. 616. The appellant is mistaken in claiming that the court finds that all the allegations

¹ 38 Am. Dec. 594.

of the complaint are true. The court only finds, as already shown, that the account was a mutual, open, and current account, instead of a stated account as alleged in the defendant's answer; but further finds that at the commencement of the action there was no balance whatever due from defendant to said Sawyer, or to his assignee, the plaintiff. In *Alhambra Co. v. Richardson*, 72 Cal. 606, it is said: "We do not think the court should strain the language of a finding to make out a case of conflict. The finding should be reconciled if it can be reasonably done." (See, also, *Schultz v. McLean*, 93 Cal. 329; Code Civ. Proc., sec. 475.)

No such error or defect is here shown as to justify a reversal.

The judgment is affirmed.

Angellotti, J., and Shaw, J., concurred.

[S. F. No. 2942. Department Two.—November 11, 1904.]

JAMES WALSH et al., Appellants, v. J. P. ABBOTT et al.,
Respondents.

DEED—DESCRIPTION—CONSTRUCTION—THIRD PART OF HALF OF RANCHO
—QUITCLAIM—EFFECT OF PATENT.—Where a grantor owned an uncertain third part of an undivided half of a rancho, and on the same day when he deeded an undivided third part of the northern half of the rancho, according to a paper title, brought suit to determine what part of the rancho he in fact owned, and subsequently claimed a patent to the undivided third part of the eastern half of the rancho, and in his deed to the grantee, after a description of the whole rancho by boundaries, added "together with all the estate, right, title, interest, and demand whatsoever which I had or may have, of, in, or to the same, or any part or parcel thereof, to have and to hold the aforesaid premises with all rights, privileges, and appurtenances thereunto belonging," unto the grantee, etc.,—the deed is to be construed most strongly in favor of the grantee, and so as to give effect to all of its operative words, and in view of the parties, the subject-matter at the time of contracting, and the attendant and surrounding circumstances leading to its execution,—and, so construed, *held*, that the deed operates as a quitclaim to the whole of the grantor's interest in the

rancho, and the effect of a patent was not to create a new title in the patentee, but to confirm in his grantee, through him, the title which had formerly been his.

APPEAL from a judgment of the Superior Court of Contra Costa County. William S. Wells, Judge.

The facts are stated in the opinion of the court.

John O'B. Wyatt, E. W. McGraw, and Rodgers, Paterson & Slack, for Appellants.

H. O. Beatty, M. R. Jones, Hartley & Abbott, A. A. Moore, George A. Lamont, W. S. Goodfellow, Garret W. McEnerney, Sanborn & Beatty, and Chickering & Gregory, for Respondents.

HENSHAW, J.—By this action plaintiffs sought to have partition of the southeast quarter of the Rancho Medanos, in Contra Costa County. The rancho lies on the southern bank of the San Joaquin River and Suisun Bay. The plaintiffs claim as heirs at law of James Walsh, deceased, and seek to establish his ownership in an undivided one-third interest in the southeast quarter of the rancho, claiming that by succession it has devolved upon them.

In 1839 the Mexican government granted the Rancho Medanos to José Antonio Mesa and José Miguel Garcea. Mesa and Garcea in 1849 granted to J. D. Stevenson the southern half of the tract of land known as Medanos. Their deeds were recorded in 1851. In 1850 Mesa and Garcea in like manner granted to Michael Murray, James Walsh, and Ellen Fallon the north half of the same tract. These deeds were recorded in June, 1850. Upon August 2, 1850, James Walsh, by deed of that date, granted to Martin Murphy the undivided one third of the northern half of the Rancho Medanos. This deed was recorded in 1851. On the day of the execution of the deed by Walsh to Murphy, Stevenson brought suit in the third district court of the state against the Garceas, the Mesas, and their grantees, Murray, Walsh, and Fallon, to reform and correct the deed to him and to the other grantees, and to partition the rancho. The suit was based upon an alleged error of description running through

all the deeds. It consisted in describing the San Joaquin River as bounding the rancho on the east, when in fact it formed the northern boundary. The action resulted in a judgment favorable to Stevenson's contention, and deeds were exchanged between Stevenson upon the one hand, and Murray, Walsh, and Fallon upon the other, whereby there was conveyed to Stevenson the west half of the rancho, and to Murray, Walsh, and Fallon the east half thereof. Subsequently, in 1853, Stevenson, Murray, Walsh, and Fallon filed with the board of land commissioners their petition for the confirmation of the grant. In that year, or in the year after, James Walsh died. After proceedings had before the board of land commissioners, and before the United States district court for the northern district of California, the grant was confirmed, the west half to Stevenson, the east half to Murray, Walsh, and Fallon, and upon October 8, 1872, the United States issued its patent to them.

Plaintiffs for title introduced the deeds and records of which reference has been made, and supplemented these with evidence that James Walsh, the patentee, was never married; that of his immediate kin, brothers and sisters, all had died unmarried without issue, saving one brother, who was the father of plaintiffs, who died in 1887, and whose death was followed by that of his wife, leaving no other issue than the plaintiffs herein.

The court, upon motion of defendants, nonsuited the plaintiffs upon this showing, and the soundness of its ruling in this regard is here attacked.

Sundry propositions are urged by respondents in support of the court's order. We pass them by, not as being without merit, but because they go merely to the question of the failure of the proof to establish title by succession in the plaintiffs. As, for example, it is urged that the proofs failed utterly to show that both the original James Walsh and the father of these plaintiffs had not, by will, devised all of their title to the lands in question; that there is no presumption of intestacy, and that the ruling of the court was proper for this reason. These points, though only for the argument which is based upon them, concede that some title to the rancho remained in James Walsh, subject to his legal disposition by grant or devise. They are passed by because their

consideration is rendered unnecessary in view of the conclusion we have reached that Walsh, by his deed to Martin Murphy, divested himself of all title. That deed is as follows:—

“Know all men by these presents, that I, James Walsh, for and in consideration of the sum of ten thousand dollars to me in hand paid by Martin Murphy, of Santa Clara County, California, at or before the ensealing and delivery of these presents, the receipt whereof I do hereby fully confess and acknowledge, I have given, granted, sold and conveyed, and by these presents, do give, grant, sell and convey unto the said Martin Murphy, his heirs and assigns forever, the undivided one-third of all that northern half part of all that certain tract of land situate in upper California, known by the name of ‘Medanos’ or ‘Meganos’ and bounded as follows: On the north by River San Joaquin, on the south by Jonathan D. Stevenson, on the east by Doctor Marsh, and on the west by Salvio Pacheco.

“Together with all the estate, right, title, interest and demand whatsoever which I had or may have of, in or to the same, or any part or parcel thereof, to have and to hold the aforesaid premises with all right, privileges and appurtenances thereunto belonging unto the said Martin Murphy, his heirs, assigns, executors and administrators to his and their use and behoof forever.

“In testimony whereof, I have hereunto affixed my hand and seal this 2d day of August, Anno Domini, one thousand eight hundred and fifty.

“JAMES WALSH. (Seal.)”

The contention of appellants is, that Walsh by this deed divested himself only of such title as he had to the northern half of the rancho, and that, as by the patent from the United States he and his cotenants, Murray and Fallon, were granted the eastern half of the rancho, he still retained his undivided interest in the south half of that east half.

The particular part of the deed calling for construction is the quitclaim clause beginning with “together with all the estate, right, title,” etc. If it shall be found that the true meaning and intent of Walsh was to grant his undivided one-third interest in the northern half of the rancho, which was all of the interest in the rancho to which he then had paper

title, and that the quitclaim clause had reference only to this northern half, the construction for which appellants contend will be established. If, upon the other hand, the view of the respondents, which view was adopted by the trial court, is the true one, then, by this clause, Walsh divested himself of all of his interest in and to all of the rancho, and the effect of the patent from the United States to Walsh was not to create a new title in him, but to confirm in his grantees, through him, the title which had formerly been his. (*Stark v. Barrett*, 15 Cal. 362; *Moore v. Steinbach*, 127 U. S. 70.)

Certain familiar principles of construction are to be invoked: first, as between the parties to the deed, it is to be construed more strongly in favor of the grantee; second, it is to be construed, if possible, so as to give all of its operative words effect; and third, if any doubt still exists as to the intention of the grantor, in arriving at that intention there shall be considered the situation of the parties, the subject-matter at the time of contracting, and the attendant and surrounding circumstances leading to the execution of the instrument. (*Brannan v. Mesick*, 10 Cal. 95.)

The first of these principles requires no special elucidation. As to the second, it is to be noted that the construction contended for by appellant gives no meaning nor effect whatsoever to the quitclaim clause. According to this construction, Walsh, having made his deed of grant to all of his interest in the northern half, in the next breath quitclaims to his grantee the same property. Such a construction makes of the clause in question nothing but empty and useless verbiage, while, upon the other hand, to construe it as respondents contend it should be construed would give reasonable and effective force to the language designedly employed. The deed would then be understood to mean that Walsh, having conveyed by grant all of the land to which he had paper title, as further assurance and confirmation of title to his grantee, and, to save the possibility of conflict over boundaries, quitclaimed to him whatever interest he might have in all of the rancho. Under this construction the "same" has reference to the Rancho "Medanos" or "Meganos," as previously employed in the deed, and in the subsequent phrase found in the *habendum* clause, "to hold the aforesaid premises," "aforesaid premises" is referable to the word "same."

The belief that such was the true intention of the grantor fairly expressed in his deed becomes fixed when consideration is paid to the surrounding circumstances. Walsh was the owner of one third of an uncertain half of the rancho. By his paper title it was the northern one-half. It is fairly inferable that Walsh knew that it was in question and in dispute as to which one half it was within which his land lay. It is fairly inferable, also, that he knew this at the time he made his deed to Murphy, because the suit to determine this question was brought upon the very day he made his deed, and it is not to be supposed that such a suit would have been commenced without an effort first made by Stevenson to reconcile these differences with Walsh, Murray, and Fallon by an exchange of deeds without the necessity of the intervention of a court. It seems in every way reasonable to conclude, therefore, that Walsh knew that his ownership to one third of the north half was disputed; that the result of the dispute could only be one of two things, to confirm him in the ownership of that particular piece, or to assign to him the ownership of one third of some other one half, as was actually done. Was it, then, the intention of Walsh in conveying to Murphy for a valuable consideration to give him a title to a limited piece, which title might prove valueless, or was it his intention to convey to him the title which he apparently had to one third of the north half, and for his grantee's further protection to assure him in this title, should it prove defective, by a quitclaim of whatever interest it might be found in truth that he did have? There can be no hesitation in saying under all of these circumstances that the latter was the true intention of the grantor.

For the foregoing reasons the judgment appealed from is affirmed.

McFarland, J., and Lorigan, J., concurred.

[S. F. No. 4123. In Bank.—November 11, 1904.]

MORRIS LUBLINER, Petitioner, v. **GEORGE ALPERS**
et al., comprising the Board of Supervisors of the City
and County of San Francisco, Respondents.

**AMENDMENT OF CITY CHARTER—CONSTITUTION—TIME FOR ELECTION—
DISCRETION OF MUNICIPAL LEGISLATURE—MANDAMUS.**—Under section 8 of article XI of the constitution, where amendments to a municipal charter are petitioned for by fifteen per cent of the qualified voters of the city, the legislative authority of the city, though required to submit the same to the voters thereof, has discretion either to call a special election or to wait until the next general election to submit the proposed amendments to a vote of the people; and *mandamus* will not lie to control that discretion by compelling the ordering of a special election.

PETITION for Writ of Mandate to the Board of Supervisors of the City and County of San Francisco.

Henley & Costello, for Petitioner.

No appearance for Respondents.

THE COURT.—The petitioner, a taxpayer of San Francisco, prays for a writ of mandate to compel the defendants to order a special election for the ratification of certain amendments to the city charter, proposed by petition of more than fifteen per cent of the qualified voters of the city.

Whether or not it is the duty of the defendants to call a special election at this time depends upon the proper construction of the following clause of section 8 of article XI of the constitution:—

“The charter, so ratified, may be amended at intervals of not less than two years by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof at a general or special election, held at least forty days after the publication of such proposals for twenty days in a daily newspaper of general circulation in such city, and ratified by a majority of the electors voting thereon, and approved by the legislature as herein provided for the approval of the charter. Whenever fifteen per cent of the qualified voters of the city shall petition the legislature au-

thority thereof to submit any proposed amendment or amendments to said charter to the qualified voters thereof for approval, the legislative authority thereof must submit the same."

We are of the opinion that under this provision of the constitution the defendants are invested with full discretion to order a special election, or, if they deem that course unadvisable, to wait until the next general election to submit the proposed amendments to a vote of the people.

Writ denied.

[Crim. No. 1146. In Bank.—November 11, 1904.]

**THE PEOPLE, Respondent, v. SHADRICK SOWELL,
Appellant.**

CRIMINAL LAW—MURDER—TRIAL JURY—CHALLENGE TO PANEL—ABSENCE OF RECORD OF SUPERVISORS—EVIDENCE OF SELECTION.—Upon a trial for murder, the absence of a record of the selection of trial jurors by the board of supervisors under the order of the superior court does not warrant the court in sustaining a challenge to the panel on that ground, where it appears clearly from the uncontradicted evidence of members of the board and of the deputy county clerk that the identical list of jurors from which the panel to try the defendant was drawn was in fact selected by the supervisors under the order of the court, and was certified to by the board as so drawn, and was delivered by it into the possession of the county clerk.

Id.—MISTAKE IN NUMBER OF JURORS DRAWN—OMISSION OF TWO NUMBERS NOT MATERIAL—CHALLENGE PROPERLY DENIED.—Where the list of jurors drawn purports to be numbered from one to three hundred, as ordered by the court, but, by inadvertence, and evident mistake, an omission of two numbers appears in the list, such omission does not constitute such a material and substantial departure from the provisions of the law as deprived the defendant of an opportunity to secure a fair and impartial jury; and the denial of a challenge to the panel will not be disturbed for such omission where it appears that a qualified and impartial jury was selected from such panel and tried the cause.

Id.—SELECTION FROM SUPERVISOR DISTRICTS—PROPORTION TO POPULATION OF TOWNSHIPS—OMISSION—PRESUMPTION—BURDEN OF PROOF.—The fact that the jurors drawn were selected from supervisor districts is not material where it appears that they were selected in proportion to the population of townships. The omission to select

jurors from a small township will be sustained on the presumption that the supervisors did their duty, and that there were no qualified jurors therein; and it was incumbent upon the defendant to prove that such township contained persons suitable and qualified to have been selected and returned as jurors to sustain a challenge to the panel for omission to select by townships.

Id.—SEPARATION OF LISTS.—Independent of the question whether the separation of lists required by section 206 of the Code of Civil Procedure does not apply solely to the separation of grand and trial jury lists, and not to township lists, and independent of the question whether the township selections may be tabulated from the trial jury lists, if it appears that the jurors had been selected from townships, the mere fact that they are not so listed in the certification to the county clerk is not of such substantial merit as to warrant the sustaining of a challenge to the panel on that account.

Id.—CHALLENGES FOR ACTUAL BIAS—QUALIFIED OPINIONS.—Challenges by the defendant to individual jurors for actual bias were properly denied where their opinions that the defendant had committed a crime in killing the deceased were not unqualified, and were based solely on public rumors and published statements, and were subject to removal by evidence on the trial, and where it appears to the court that the jurors would act impartially and fairly upon the evidence.

Id.—PREJUDICE AGAINST DEFENSE OF INSANITY—QUALIFICATIONS OF STATEMENT—CHALLENGES PROPERLY DENIED.—Where questions put to jurors by the defendant tended to bring out an expressed prejudice against the defense of insanity in general, which really related only to the possible interposition of simulated or feigned insanity as a defense, and the jurors upon further examination stated that they had no prejudice against real insanity proved as a defense, and that if such insanity were proven by the defendant, they would recognize and adopt it as a good and perfect defense, and would abide by and follow the instructions of the court as to the law governing the matter of insanity, the court did not err in denying challenges to such jurors.

Id.—CONTRADICTORY STATEMENTS OF JUROR—CONSTRUCTION—PROVINCE OF TRIAL COURT.—Where the evidence of a juror upon a challenge for actual bias is contradictory in itself, and subject to more than one construction, and a finding either way would have support in the evidence, the trial court is the final arbiter of the question, and its ruling will not be disturbed upon appeal.

Id.—EVIDENCE—DYING DECLARATIONS.—Where the preliminary proof showed that the declarations of the deceased as to the circumstances attending the shooting of him by the defendant were made in expectation of death, and after all hope of recovery was abandoned, his dying declarations were admissible in evidence against the defendant.

ID.—ORAL DECLARATIONS—THOUGHT OF DECEASED—RULING NOT PREJUDICIAL—THOUGHT OF DEFENDANT.—Where the dying declarations were oral, and contained the statement “that he thought the defendant thought he was shot through the body,” the overruling of a motion to strike out such statement is not prejudicial error, where it appears that the defendant, in giving his version of the shooting after it occurred, stated that when he fired at the deceased he thought he hit him in the side.

ID.—EXPERT TESTIMONY AS TO INSANITY.—An expert witness for the people is competent to give his opinion, addressed to the condition of the testimony in the case on the part of the defendant, that it was impossible to have all the symptoms recited in such evidence in the same individual.

ID.—OPINION AS TO INSANITY—RULING NOT PREJUDICIAL.—Upon the application of the expert witness to the court as to whether it was necessary to believe all the testimony he heard as an expert, and whether he was compelled to pass his opinion, a ruling of the court that he might pass it upon what he deemed the truthfulness of the testimony is not prejudicial error against the defendant, where the witness, still speaking generally of the testimony for the defendant, answered: “If all these conditions existed in the same individual, I would believe the man was certainly insane.”

APPEAL from a judgment of the Superior Court of Butte County and from an order denying a new trial. John C. Gray, Judge.

The facts are stated in the opinion of the court.

W. E. Duncan, Jr., for Appellant.

U. S. Webb, Attorney-General, and J. C. Daly, Deputy Attorney-General, for Respondent.

LORIGAN, J.—The defendant was convicted of murder in the first degree, sentenced to be imprisoned for life, and from the judgment and order denying his motion for a new trial appeals.

No point is made as to the sufficiency of the evidence to sustain the verdict, but he claims that for certain alleged errors committed during the trial the judgment should be reversed, and these are presented as follows:—

1. He insists that the court erred in denying his challenge to the panel of trial jurors drawn to try his case, which challenge was interposed upon the ground that there had been a

material departure from the forms prescribed by sections 204, 205, and 206 of the Code of Civil Procedure, in the selecting and listing by the board of supervisors of jurors from which said panel was drawn, and which departure is made the basis of a challenge by section 1059 of the Penal Code.

The particular grounds urged were, that there was no record of the board of supervisors disclosing that any trial jurors had been selected by such board, as ordered by the superior court, under said section 204 of the Code of Civil Procedure; that if such selection were made there were but two hundred and ninety-eight jurors listed, notwithstanding the order of the superior court required the selection of three hundred; that the jurors selected and listed were selected by the board of supervisors by supervisor districts, and not by townships and in proportion to the population therein, and that the lists of selected jurors were not kept separate and distinct from each other. (Code Civ. Proc., secs. 205, 206.)

We do not think the action of the court in denying the challenge should be disturbed. The first two objections urged—the absence of any record on the minutes of the board, and the selection of a less number than required by the order of the court—do not present such substantial departures from the provisions of the law governing the selection of jurors as deprived the defendant of an opportunity to secure a fair and impartial jury, which is the main purpose to be conserved by adherence to the requirements of the provisions of the codes cited. As far as the failure of the minutes of the board of supervisors to contain a record of the selection is concerned, it appears clearly from the uncontradicted evidence of members of the board of supervisors who made the selection, and that of the deputy county clerk, that the list of jurors from which the panel to try defendant was drawn was in fact selected by said supervisors under the order of the court, and was certified to by the said board as so drawn, and was delivered by it into the possession of the county clerk. There was no question as to the identity of the list as being the one that was selected by the board under the order nor was there any question that it was from this list of jurors whose names were placed in the box that the panel which defendant challenged was drawn. Under this showing, that,

as a matter of fact, the jurors on the list certified and delivered to the county clerk were selected by the board of supervisors, the circumstance that an entry of such selection was omitted from the records of the board would not warrant the court in sustaining the challenge on that ground.

As to the ground of challenge that a less number of jurors were selected than were designated by the order of the court: It is not apparent from the record how the omission to return the full number required by the order occurred; it was not claimed, however, to have been intentionally done, and was doubtless inadvertent, because it appears from the certificate of the members of the board of supervisors to the list, and from their testimony on the hearing, that they intended to select and return three hundred. The list purports to be numbered from 1 to 300, but it appears that jurors whose names should have been placed opposite numbers 178 and 179 in the list, together with these numbers, were omitted. How this occurred was not explained upon the hearing; no inquiry was made by either side about it, and there is now no suggestion that this failure was prompted by any improper motive, or was the result of design. It may have occurred, and probably did, through a clerical omission in preparing the complete list for certification to the county clerk from the separate lists made out by each supervisor. It is true that this omission was a failure to follow the order of the court under the plain mandate of the statute, and while it cannot be too strongly urged that in selecting and returning jurors the provisions of the statute should be literally followed, yet the law has recognized possible departures from what is required, and to meet them has provided that not every such departure should be a successful ground of challenge, but only material ones. Material departures are only such as affect the substantial rights of a defendant in securing an impartial jury, and it is not apparent from the record before us how the fact that the supervisors returned two hundred and ninety-eight instead of three hundred jurors could have at all prevented this defendant from securing such a jury. There was no question but that the jurors who were selected were individually suitable and qualified to be returned as such, and that more than enough were returned by the board from which the defendant might select and obtain a jury, and.

in fact, out of the panel of ninety-one which he challenged such a jury was ultimately selected and tried the cause.

A point similar to the one here discussed was made in the case of *People v. Davis*, 73 Cal. 355, 359, and it was there held that the failure to return the full number of jurors designated by the order of the court was not such a material departure as warranted sustaining a challenge to the panel on that account.

As to the challenge on the grounds that the jurors were selected from supervisor districts, and not by townships in proportion to the population thereof, and that the lists were not kept separate and distinct, less need be said. The testimony of the members of the board who made the selections showed that in each supervisorial district such selections were made and apportioned from the judicial townships therein, and were in general proportioned to their population, except as to Humboldt Township, which contained eighty-seven voters, and from which no jurors seem to have been selected. While it is probable that there were some persons among these voters suitable to have been returned as jurors, it is still possible that there were not. The fact that there were a given number of voters in the township is not evidence that any of them were qualified to be returned as jurors. The qualifications of jurors and of electors are quite different. A person may be qualified as an elector who would be disqualified as a juror, and it must be assumed, in the absence of all evidence to the contrary, that as the law directed the supervisors to select a proportionate number of jurors from Humboldt Township, as well as the other townships, that this was not done because there were no persons in the former who were suitable and qualified as such.

If this were not so, it was incumbent on the defendant—the presumption being that the board properly discharged its duty—to introduce evidence (which he did not) showing that there were persons in that township suitable and qualified to have been selected and returned as jurors.

As to the point that the lists were not kept separate and distinct: It is assumed by both sides in this case that the requirement of section 206 of the Code of Civil Procedure in that regard applies to the township selections; that the lists of selection from each township must be kept separate and

distinct from each other. It may well be questioned whether this requirement does not really apply to keeping the lists of grand and trial jurors, which under the order of the court, the supervisors are required to select, separate and distinct from each other, rather than to so keeping township lists. If this were the true construction to be given to the section, as the lists of grand and trial jurors were in fact kept separate, no further mention of this point would be necessary.

On the assumption, however, made by both sides (which for present purposes only will be deemed correct), that the requirement applies to the township selections, it appears as a fact that each supervisor selected the jurors from the townships within his district, and the general lists certified to the county clerk showed such selections. Counsel for defendant in his brief has found no difficulty in tabulating from these selections and listings the jurors selected from each township, and it appears to us that no one interested in the matter would be unable to do so. But were it otherwise, and independent of the question whether the requirement does not apply exclusively to keeping grand and trial jury lists separate, we would not feel disposed to hold that where it appeared that the jurors had been selected from townships, that the mere fact that they had not been so listed in the certification to the county clerk was of such substantial merit as to warrant sustaining a challenge on that account.

2. It is next insisted that the court erred in denying defendant's challenge to some twelve jurors on the ground of actual bias. This bias was claimed to be evidenced by their statements upon their *voir dire* that they were of opinion that the defendant in killing deceased had committed a crime. But these opinions were founded solely upon public rumors or based upon statements in public journals, and were not unqualified; they were subject to removal by evidence on the trial, and it appearing to the court that, notwithstanding such opinion, the jurors would act impartially and fairly upon the evidence, the challenges were properly denied. (Pen. Code, sec. 1076; *People v. Brown*, 59 Cal. 354; *People v. Miller*, 125 Cal. 46.)

In this same line it is also urged, that the court erred in denying certain challenges of defendant to jurors whose testimony, it is insisted, showed that they entertained a prejudice

against insanity as a defense, and this was the defense alone which the defendant interposed. The examination of these jurors as to insanity as a defense was quite exhaustive, and the inquiries were as to sanity in general. Attention was not particularly directed to that insanity which alone is recognized by the law as a defense, and the existence of which relieves the defendant from responsibility. (*People v. Hoin*, 62 Cal. 120.¹) And it is quite obvious that, under the inquiries which were made of the jurors concerning their views upon such a defense in general, that the prejudice which they expressed was directed to the possible interposition of simulated or feigned insanity as a defense to avoid responsibility for crime, instead of the existence of real insanity, which relieves from it, and, while it is true that their preliminary statements were that they entertained a prejudice to some extent against such a defense, it is equally clear from their testimony upon further examination, and, in fact, from their entire examination upon the point, that this prejudice did not extend to cases where proof of real insanity was made; and that in the case at bar, if such insanity were proven by the defendant they would recognize and adopt it as a good and perfect defense, and that, as to the law governing the matter of insanity, they would abide by and follow the instructions of the court relative to it.

Under this showing we cannot say that the court erred in denying the challenges. The defendant was only entitled to a jury which would give the defense of insanity, like any other defense, full and fair consideration, and act upon it when duly proven as a valid and complete defense, and this the responses of the jury, taken as a whole, satisfied the court they would do.

But if it were not obvious from the testimony of these jurors that whatever degree of prejudice they entertained arose from the impression, popularly entertained, that insanity as a defense is often simulated and feigned, and that the prejudice of which they were speaking had no relation to real insanity, still the most that can be urged upon the record is, that the evidence given by each of these jurors on the subject was in itself contradictory, and it is well settled that, under such circumstances, it is exclusively the province of the trial

¹ 45 Am. Rep. 651.

court to determine the credit which should be given it, and that its determination in that respect is not subject to our review. As was said in *People v. Fredericks*, 106 Cal. 559, "In this case the examination of some of the venire, who were subsequently unsuccessfully challenged upon the ground of actual bias by the defendant, discloses a state of facts which might well have justified the trial court in excluding them from the jury-box. But the evidence of these various jurors taken upon their *voir dire* is not at all conclusive that they were disqualified from acting in the case. When the matter was submitted to the court for a decision upon the evidence taken, it can at least be said the question was an open one as to their disqualification. The evidence of each juror was contradictory in itself; it was subject to more than one construction. A finding by the court either way upon the challenge would not have support in the evidence, and under such circumstances the trial court is the final arbiter of the question. For under such circumstances the question presented to this court by the appeal is one of fact, and our power to hear and determine is limited to appeals upon questions of law alone." (Also, *People v. Scott*, 123 Cal. 435.)

3. The point that the court erred in refusing to strike out the testimony as to the dying declaration of the deceased, on the ground that no sufficient foundation had been laid for its admission, is without merit. The point urged was, that there was no sufficient proof that it was made in the belief that every hope of life was gone. The evidence, however, fully showed that the declaration of the deceased concerning the circumstances attending the shooting was made in expectation of death, and after all hope of recovery (if ever entertained) was abandoned.

The dying declaration of the deceased was oral, and in detailing it the witness called for that purpose testified that the deceased stated to him, "that the defendant after shooting him had walked over to where he was lying and said 'You damned old cripple, I will finish you now'; that the deceased begged of him not to shoot again as he would die from the wound he had already received; that he thought the defendant thought he was shot through the body," and that defendant then left him. The defendant moved to strike out the latter portion as to what the deceased "thought the de-

fendant thought" as to the shot, which was denied, and he assigns this as error. Assuming that the motion should have been granted, we do not perceive that its refusal was such prejudicial error as would warrant a reversal upon that ground, particularly when it appears that the defendant, in giving his version of the shooting after it occurred, himself stated that when he fired at the deceased he thought he had hit him in the side.

4. The defense interposed being insanity, and evidence on that matter having been introduced in defendant's case in chief, in rebuttal the prosecution called one Dr. John W. Robinson as an expert witness upon that subject. The doctor had been present in court during several days while the witnesses for the defense were giving their testimony as to the insanity of the defendant, heard it all, and had observed the manner and conduct of the defendant during that period. Certain hypothetical questions purporting to be based on the entire evidence in the case having been put to the witness, and he having answered that there was nothing embraced in the statement contained in the question which, in his opinion, indicated that the defendant was insane, the prosecution then directed his attention, particularly, to various acts and peculiar conduct on the part of the defendant, claimed by the defense to indicate insanity, and he was asked whether, in his opinion, they did so. In answering he said (and here arises the particular error complained of): "It would be to my mind impossible to have all these symptoms present in the same man. It would indicate acute mania, melancholia, homicidal melancholia, or suicidal melancholia, possibly all of those, but not in the same individual. For that reason it is necessary for me to again apply to the judge—Is it necessary for me to believe all the testimony I hear as an expert—am I compelled to pass my opinion?" *The Court*.—"On what you deem the truthfulness of the testimony." This was objected to as incompetent; the objection was overruled, and the witness then completed his answer: "If all these conditions existed in the same individual I would believe the man was certainly insane. As an expert I do not believe that all these conditions can exist in the same individual."

It is claimed by defendant that allowing the witness to pass his opinion on "what he deemed the truthfulness of the

testimony" was an invasion of the province of the jury, to whom is committed exclusively the right to judge of the credibility of the witnesses.

It is quite apparent, however, that whether the rule announced by the court was right or not, the subsequent answer of the witness discloses that he did not make any application of it, or, if he did, its application was favorable to the defendant. As we understand his answer, given after the objection was interposed, nothing was said by him from which it could be inferred that the particular credibility of any witness was taken into consideration by him, nor was his answer predicated at all upon an application of the rule announced by the court. Indeed, the first part of his answer was based upon the assumption that all the facts concerning the defendant, referred to in the inquiry put to him as collated from the testimony of the witnesses for the defense, were true, and his answer thereon was favorable to the claim of the defense that the matters referred to indicated that the defendant was insane. Certainly it cannot be said that an assumption by the witness that all the matters relied on by the defendant were true and a favorable opinion announced on them could be in any manner prejudicial to him.

And the last portion of his answer, that as an expert he did not believe that all the conditions testified to could exist in the same individual, is in no respect different from what he had testified to in his answer given previous to the objection interposed,—namely, that to his mind it was impossible to have all the symptoms recited present in the same individual. There was no discrimination made as to the testimony of any particular witnesses, or as to any particular facts. His opinion was addressed to the condition of the testimony in the case on the part of the defendant, as it disclosed symptoms claimed to be indicative of the insanity of the defendant. This was certainly a matter upon which, as an expert on insanity, he was competent to give his opinion. No exception could be taken seriously if the inquiries had been directed toward ascertaining from the witness, by reason of his particular knowledge of mental diseases, what particular symptoms would be indicative of the presence of a particular phase of insanity,—whether mania, melancholia, or other phases,—and whether those symptoms which manifested the presence

of one phase would be present or absent in another. And this being true, we do not perceive upon what principle an expert in mental diseases should be precluded from giving it as his opinion upon the general manifestations relied on to support insanity, that, as a principle of medical science, they could not be all present in the same individual.

This disposes of all the points made, and there being no error in the record, the judgment and order denying a new trial are affirmed.

McFarland, J., Angellotti, J., Henshaw, J., Van Dyke, J., and Shaw, J., concurred.

[S. F. No. 3036. Department One.—November 11, 1904.]

C. HELLING, Respondent, v. H. B. SCHINDLER, Appellant.

MASTER AND SERVANT—SAFETY AND REPAIR OF APPLIANCES—LIABILITY OF EMPLOYER—QUALIFICATION OF RULE.—The general rule requiring an employer to furnish appliances that are reasonably safe, and to use reasonable care to keep the same in repair, and that this duty cannot be delegated, does not apply to defects arising in the daily use of an appliance which are not of a permanent character and do not require the help of skillful mechanics to repair, but which may easily be, and usually are, required by the workmen, and to repair which suitable materials are supplied, unless such defects become actually known to the employer, or continue for so long a time or under such circumstances as to warrant the conclusion that in the exercise of reasonable care he should have known thereof.

II.—SLIGHT DEFECTS ATTENDANT UPON OPERATION OF MACHINERY—DUTY OF MASTER NOT INVOLVED—NEGLIGENCE OF FELLOW-SERVANT.—Slight defects attendant upon the operation of machinery which, from their nature, require remedying at the hands of the operators themselves, and as a part of the proper operation of the machine, are not required to be remedied by the master, and any negligence in the performance of that duty by a particular employee whose business it is to remedy such defects is the negligence of a fellow-servant.

II.—DULLNESS OF KNIVES OF PLANER—LOOSENESS OF BELT—REMEDIES FOR OPERATION—EMPLOYER NOT LIABLE.—The mere dullness of the knives of a planer, which may be sufficiently remedied by a file in the hands of an employee, and the mere looseness of a belt, which

may be remedied by putting on a dressing with which an employee is supplied, are defects of such a nature that the employer cannot be held responsible therefor, in the absence of other circumstances.

ID.—EVIDENCE—REPAIRS AFTER ACCIDENT.—Evidence simply to the effect that after the accident the knives were sharpened by the foreman before being again used, is not admissible for any purpose; and its admission is error, necessitating a reversal of a judgment for the plaintiff.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

C. H. Wilson, for Appellant.

The dullness of the knives and looseness of the belt were defects in operation of the planing-machine which it was no part of the duty of the employer to remedy, but the remedy thereof was committed to an employee, for whose negligence the master was not responsible. (*Webber v. Piper*, 109 N. Y. 496; *Cregan v. Marston*, 126 N. Y. 568;¹ *McGee v. Boston Cordage Co.*, 139 Mass. 445-448; *Johnson v. Boston Towboat Co.*, 135 Mass. 209-211;² *Steamship Co. v. Ingebregsten*, 57 N. J. L. 400;³ *Harley v. Buffalo etc. Co.*, 142 N. Y. 31, 37; *Theleman v. Moeller*, 73 Iowa, 108;⁴ *Burns v. Sennett*, 99 Cal. 363-367; *Noyes v. Wood*, 102 Cal. 389-393; *Callan v. Bull*, 113 Cal. 593-602; 1 Bailey on Personal Injuries, sec. 259 et seq.; 12 Am. & Eng. Ency. of Law, 2d ed., p. 464; 1 Shearman & Redfield on Negligence, 5th ed., sec. 195, p. 315.) Evidence of the repair of the knives by sharpening them after the accident was inadmissible. (*Sappenfield v. Main-Street etc. Co.*, 91 Cal. 48; *Hager v. Southern Pacific Co.*, 98 Cal. 309-311; *Turner v. Hearst*, 115 Cal. 394-401; *Limberg v. Glenwood*, 127 Cal. 598-614; *Dougan v. Champlain Transportation Co.*, 56 N. Y. 1; *Nally v. Hartford Carpet Co.*, 51 Conn. 524;⁵ *Aldrich v. Concord etc. R. R. Co.*, 67 N. H. 250; *Georgia etc. R. R. Co. v. Cartledge*, 116 Ga. 164; *Morse v. Minneapolis etc. R. R. Co.*, 30 Minn. 465; 20 Am. & Eng. Ency. of Law, 2d ed., p. 85; 21 Am. & Eng. Ency. of Law, 2d ed., p. 521.)

¹ 22 Am. St. Rep. 851.

² 46 Am. Rep. 458.

³ 51 Am. St. Rep. 604.

⁴ 5 Am. St. Rep. 667.

⁵ 50 Am. Rep. 47, and note.

J. L. Geary, Jr., for Respondent.

The foreman whose duty it was to sharpen the knives and keep the belt in repair and proper condition was the representative of the employer and not a fellow-servant. (*Besson v. Green Mountain etc. Co.*, 57 Cal. 20; *Sanborn v. Madera Flume Co.*, 70 Cal. 205; *Davis v. Southern Pacific Co.*, 98 Cal. 24;¹ *Verdelli v. Gray's Harbor etc. Co.*, 115 Cal. 517; *Callan v. Bull*, 113 Cal. 600; *Higgins v. Williams*, 114 Cal. 181; *Tedford v. Los Angeles etc. Co.*, 134 Cal. 76; *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Fuller v. Jewett*, 80 N. Y. 46;² *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240.³) The evidence of subsequent changes was admissible as showing the defective condition of the machinery at the time of the accident. (*Louisville etc. Ry. Co. v. Malone*, 109 Ala. 518; *Kuhns v. Wisconsin etc. Ry. Co.*, 76 Iowa, 71; 21 Am. & Eng. Ency. of Law, 2d ed., p. 522; *Butcher v. Vacaville etc. Ry. Co.*, 67 Cal. 518-525; *Colorado Mtg. Co. v. Rees*, 21 Colo. 435; *Marder, Luse & Co. v. Leary*, 35 Ill. App. 420; aff. 137 Ill. 319; *Pennsylvania Co. v. Witte*, 15 Ind. App. 583; *City of Chicago v. Dalle*, 115 Ill. 386; *Kraatz v. Brush etc. Light Co.*, 82 Mich. 457; *Brooke v. Chicago etc. R. Co.*, 81 Iowa, 504; *San Antonio etc. Ry. Co. v. Beam*, (Tex. Civ. App.) 50 S. W. Rep. 911; *Harroun v. Brush Electric Light Co.*, 12 N. Y. App. Div. 129; *Norris v. Atlas S. S. Co.*, 37 Fed. 426; *Atchinson etc. Ry. Co. v. McKee*, 37 Kan. 592.)

ANGELLOTTI, J.—This is an action for damages for personal injuries. The plaintiff was employed by defendant as a wheelwright, and his left hand was badly cut by the knives of a buzz-planer while he was using such planer in the course of his employment. His claim, as set forth in his complaint, was that, at the time of the accident, the planer “was out of repair and unsafe for the uses and purposes for which said machine and apparatus were intended, to wit: the knives and apparatus thereof were dull, and the belt thereof connecting said machine with the power-shaft of said plant and putting said machine and the said knives in motion was loose and failed to give to said knives speed and velocity sufficient

¹ 35 Am. St. Rep. 133.

² 14 Am. Rep. 598.

³ 36 Am. Rep. 575.

and necessary to plane a board upon which plaintiff was then operating," by reason of which, while planing a board, his left hand was thrown upon and in the knives of the machine.

He obtained a judgment for twenty-five hundred dollars, and the defendant appeals from the judgment and from an order denying his motion for a new trial. The defendant in his answer denied these allegations of the complaint. He also alleged contributory negligence on the part of the plaintiff, and also that the injury was caused by the fault and negligence of fellow-servant.

1. The principal question discussed by counsel in this case is as to whether, assuming that the accident was due to the dullness of the knives or the looseness of the belt, the evidence does not show a case where, under the circumstances, the negligent condition must be attributed to the negligence of a fellow-servant, rather than that of the employer.

The trial court adopted the theory that for any such conditions, the employer must be held responsible, and that there was no question as to the negligence of a fellow-servant involved in the case. It therefore refused to grant a nonsuit, refused to instruct the jury upon the question of negligence of a fellow-servant, and instructed the jury to the effect that if the planing-machine was not in a reasonably safe and suitable condition in either of the particulars claimed, and plaintiff did not or could not by the exercise of reasonable care know of such condition, and his injuries were the result thereof, their verdict must be for the plaintiff.

Excluding from consideration the evidence as to subsequent repairs, which, as we shall show hereafter, was improperly admitted, the case presented was substantially as follows:—

The planing-machine in question was used, as their needs required, for the purpose of planing small pieces of wood, by all of the men employed in the woodworking department of defendant's establishment, including a foreman of such department. There were six or seven men so employed. The planer was at the time of the accident in perfect condition, except that the knives had then become dull to some extent, and the belt somewhat loose, from use by these employees. No part of the machine broke or gave way. It was the duty of

the foreman to see that the knives were kept sufficiently sharp and the belt sufficiently tight to properly run the machine. When the belt became so loose as to slip, the usual and customary way of remedying the defect was by putting on belt-dressing, unless it became so loose as to require being shortened. When the knives became dull from use, which was a frequent occurrence, the ordinary method of sharpening was for the foreman to file them, without removing them from the machine, unless the edges had become so worn from long use that they could not be filed to advantage, in which event they were taken out and sent away to be ground. As long as the machine would, when used in the ordinary manner, efficiently do the work, it could not be said to be defective in either of the respects suggested, and both alleged defects were of such a nature that, admittedly, they would at once come to the knowledge of any experienced operator attempting to use the machine, for the effect of the machine upon the board sought to be planed would indicate the condition.

Plaintiff had been employed in this shop for more than nineteen months, and had continuously used this machine, as required by his work, sometimes ten, fifteen, or twenty times a day, up to the time of the accident. He had used it on the day before the accident. At the time of the accident, having occasion to plane a board, he waited for the foreman to finish planing a board, and then put his own board on the machine. He passed the board over the machine once, and noticed nothing wrong with the manner in which it worked, and, the board not being sufficiently smooth, he commenced to pass it over again, when, as he said, "it started jumping repeatedly and threw my hand into the knives." He knew that the knives in this planer became dull from use and frequently had to be sharpened, and that the belt frequently became somewhat slack from use, but claimed that he did not know that the knives were dull or the belt slack in this instance until the moment of the accident. There is nothing to indicate that the machine had not worked efficiently up to that very moment. The knives were dull to an extent, but not so dull but that they would do the work all right, and the same is true as to the slackness of the belt. The machine had been constantly used on the morning of the accident, right up to the happening thereof, between ten and eleven o'clock. Nor is there any-

thing in the record to indicate that anything more was necessary to fully sharpen the knives than the mere filing thereof, or that the slackness of the belt could not be easily remedied by means at hand, which it was the duty of the foreman to use.

We have thus evidence tending to show a case where the duty of keeping a single piece of safe and adequate machinery in proper running order had been confided to one of six or seven employees, whose duty it was to use the machinery in common, and a case where the particular defects complained of were defects necessarily attendant upon the use of such machinery, which would at once manifest themselves to an operator thereon, and which could immediately be easily remedied by simply filing the knives and tightening the belt, duties which may with propriety be said to have to do only with the operation of the machinery.

It is manifest that the rule requiring an employer to keep appliances furnished to employees in a reasonably safe and suitable condition, a rule absolutely essential to the proper protection of employees, cannot be held applicable to every defect arising in the daily use of the appliance and consequent upon such use.

It is incumbent upon the employer to furnish an appliance that is reasonably safe, and to use reasonable care to keep the same in proper repair, and this duty he cannot delegate so as to escape liability. The well-settled rule in this regard is clearly stated, and the authorities cited, in *Shelton v. Pacific Lumber Co.*, 140 Cal. 507, 511.

But there are certain duties necessarily attendant upon the operation of some appliances, and which really have to do only with their proper operation, which if left unperformed render the machinery unsafe, or at least inefficient. Take, for instance, the necessity of keeping certain machinery well oiled. A locomotive engineer is injured solely because of the negligence of his fireman in the matter of oiling the machinery of the engine. The machinery was made unsafe by reason of such negligence, but if the employer has used reasonable care in the employment of the fireman, he cannot be held responsible to the engineer for his negligence. Such a duty must of necessity be intrusted to the operatives, and has nothing to do with the employer's duty of furnishing and keeping

in repair. And the same would clearly be true as to the duty of keeping the planing-machine in question well oiled, which duty, the record shows, was that of another one of the six or seven employees using the machine. As was said in the case of *Webber v. Piper*, 109 N. Y. 496, which was the case of a circular saw dull from use, "There are many matters of detail in the management of safe and adequate machinery which must be intrusted to the operatives, and as to which the master owes no duty except the employment of competent workmen. . . . The line of division between the duty of the master to furnish and maintain safe and adequate machinery, and that of the operative to manage and handle it with prudence and care, is difficult to define by any general description, but is quite obvious when each case, as it arises, comes under consideration. In the one before us, the neglect, if any, was in a detail of the management of the machinery. A master builder might furnish proper tools to his workmen, but it would not be his duty to sharpen every chisel as it became dull, or set every saw when that need arose." In *Cregan v. Marston*, 126 N. Y. 568,¹ it was said: "The servants cannot furnish the machines. That is the master's right and duty, but the servant who uses them can and should keep them in order for their proper and safe daily use when furnished with the necessary means of so doing and when perfectly capable of correcting the defect."

In *Bailey on Personal Injuries* (vol. 1, sec. 259) it is declared that "the general rule does not apply to defects arising in the daily use of an appliance which are not of a permanent character and do not require the help of skillful mechanics to repair, but which may easily be and usually are repaired by the workmen, and to repair which proper and suitable materials are supplied." (See, also, *Cregan v. Marston*, 126 N. Y. 568;¹ 20 Am. & Eng. Ency. of Law, 2d ed., p. 89; 1 *Shearman & Redfield on Negligence*, 5th ed., sec. 195; *McGee v. Cordage Co.*, 139 Mass. 445.) This principle has been applied in many cases, and we know of no case that has gone to the extent of holding that there is not some such limitation upon the general rule as above suggested. The differences that we find in the reported cases are upon the question as to whether the facts of a particular case bring it

¹ 22 Am. St. Rep. 854.

within the operation of the general rule or the qualification thereof, for, as said in *Webber v. Piper*, 109 N. Y. 496, the line of division is difficult to define by any general description. The statement quoted above from *Bailey on Personal Injuries* is, at least so far as those engaged in the common use of an appliance are concerned, sustained by the great weight of authority. Of course, if any such defects as are included therein become actually known to the employer, or continue for so long a time or under such circumstances as to warrant the conclusion that, in the exercise of reasonable care, he should have known thereof, another element is introduced, upon which a liability upon his part might be based. There is, however, no such element shown by the record in this case. The qualification we are considering relates only to such slight defects attendant upon the operation of machinery as from their nature require remedying at the hands of the operators themselves and as a part of the proper operation of the machine. We are of the opinion that it is clear that any such mere dullness of the knives in the planer in question, produced by the ordinary use thereof, as might be sufficiently remedied by the use of a file in the hands of one of the employees, was a defect of such a nature that the employer could not be held responsible therefor, in the absence of other circumstances. It was something necessarily attendant upon the use of the machine which could be easily remedied whenever it occurred by the operators themselves, and for which the means of remedying were supplied to one of their number. The remedying of such a defect would really be a part of the proper operation of the machine, and therefore not "an act the duty for the performance of which belongs in law to the master," and any negligence in the performance of that duty by the particular employee whose business it was to perform it would be the negligence of a fellow-servant.

The same, we think, is true as to the belt, if it be assumed that the slackness thereof could have contributed to the accident.

We have examined all of the many cases cited by plaintiff's counsel, and find nothing therein in conflict with the views already stated.

The general rule as to the employer's liability is fully conceded, and it may be freely admitted that he must take notice

of the liability of appliances to wear out from use and become unsafe, and guard against such conditions. The qualification of the rule as to such defects as are attendant upon the operation of the machinery, and the remedying of which is in its nature really a part of such operation, and therefore the duty of the employee rather than the employer, is not disputed by the authorities cited, but is in fact expressly recognized by some of them.

It is manifest from the foregoing that, independent of the question as to whether there was evidence which would support a finding of negligence on the part of defendant, and as to which the trial court said in denying the motion for a nonsuit, "It is a very, very close question in my mind," the court erred in instructing the jury to the effect that they should find for plaintiff, if they believed that the machinery was at the time of the injury not in a reasonably safe and suitable condition in both or either of the particulars claimed by plaintiff, that plaintiff did not know of such defective condition or could not have known thereof by the exercise of ordinary care, and that his injuries were the result thereof. There was certainly evidence which, under the views already stated, would have sustained a finding that any defective condition in the respects suggested was due to the negligence of a fellow-servant rather than that of the master. The instruction noted ignored this condition of the evidence, and required a verdict for plaintiff, even though the negligence was solely that of the fellow-servant.

2. There was also error necessitating reversal in the admission of evidence as to repairs made after the accident. Whether or not any negligence on the part of defendant was the proximate cause of the accident to plaintiff was one of the matters in issue. The evidence plainly showed that the knives of the planer were more or less "dull," and that the belt connecting the machine with the motive power was more or less "loose." The questions in this connection were, however, whether the knives were so dull and the belt so loose as to render the planer in any degree unsafe for use in the manner in which it was ordinarily used, whether the defendant knew, or in the exercise of reasonable care should have known, of these conditions, and whether such dullness or looseness, or both, proximately caused the accident. Unless these ques-

tions could be answered in the affirmative, there could be no finding of actionable negligence on the part of defendant.

Under these circumstances, over the objection of defendant that the proposed evidence was irrelevant, immaterial, and incompetent, and that it was not proper to show the mere fact of repairs made after the accident, or to show any act done by defendant with reference to the machine after the accident, plaintiff was allowed to introduce evidence to the effect merely that immediately after the accident the knives, before being again used, were taken by order of defendant's foreman to a planing-mill and sharpened, and also that directly after the accident the belt was tightened by said foreman, by taking an inch and a half or two inches out of it. There was nothing in the evidence so given to indicate how much "sharpening" was done, or what work was necessary to make the knives "sharp." The only conceivable effect of this evidence as to the sharpening of the knives, limited as it was to the mere fact of the making of repairs immediately after the accident, was to impute to defendant's foreman an admission to the effect that the knives were so dull as to render the machine unsafe for use, and that such condition was the cause of the accident. Assuming that the foreman could bind the defendant by any such admission, it is now well settled in this state, in accord with the rule prevailing generally elsewhere, that evidence of precautions taken and repairs made after the happening of the accident is not admissible to show a *negligent* condition at the time of the accident. This matter was fully discussed in the case of *Sappenfield v. Main-Street etc. Co.*, 91 Cal. 48, where this court said: "The negligence of the employer which renders him responsible for the accident depends upon what he did and knew before the accident, and must be established by facts and circumstances which preceded it, and not by acts done by him after its occurrence." The court there approvingly quoted from *Nally v. Hartford Carpet Co.*, 51 Conn. 524,¹ as follows: "The fact that an accident has happened, and some person has been injured, immediately puts a party on a higher plane of diligence and duty, from which he acts with a view of preventing the possibility of a similar accident, which should operate to commend rather than to condemn the person so acting. If the

¹ 50 Am. Rep. 47, and note.

subsequent act is made to reflect back upon the prior one, although it is done upon the theory that it is a mere admission, yet it virtually introduces into the transaction a new element and test of negligence, which has no business there, not being in existence at the time." The Sappenfield case has been followed and approved in *Hager v. Southern Pacific Co.*, 98 Cal. 309, 311; *Turner v. Hearst*, 115 Cal. 394, 401; *Limberg v. Glenwood*, 127 Cal. 598, 604. The decision in *Butcher v. Vacaville Ry. Co.*, 67 Cal. 518, 525, so far as it is in conflict with these views, has been, in effect, overruled by each of the cases cited.

Counsel for plaintiff concedes that it is settled in California that evidence of subsequent repairs or changes is not admissible to prove prior negligence. He, however, claims that the evidence was admissible here to show the actual condition of the machinery at the time of the accident.

There is a line of decisions in other states upholding what may be said to be a qualification to the rule just discussed, to the effect that where evidence of subsequent changes, though it may be in the way of repairs or additional precautions, fairly tends to show the actual conditions existing at the time of the accident, it is admissible *for that purpose*. It would seem unnecessary to consider this alleged qualification of the general rule, for we cannot see that it is at all applicable to the evidence under consideration. So far as the knives were concerned absolutely nothing was shown thereby beyond the mere fact that they were put through the process of being sharpened anew before again being used. This mere fact tended to show at most nothing more than an admission on the part of the foreman that they were so dull as to render the machine unsafe for use, and that the accident was caused by this condition, and came within the effect of the general rule already discussed.

The qualification relied on by plaintiff does not go to the extent necessary to sustain respondent under the facts of this case. The first decision cited and quoted from by him, *Louisville etc. Ry. Co. v. Malone*, 109 Ala. 518, declares emphatically as follows: "In our opinion, if nothing can be shown except the fact of repairing, that fact is not competent to be considered by the jury. To hold that an act of repairing affords evidence tending to show that a previous injury was

the result of a defect in the appliances would deter a prudent person from making repairs." In the second case cited and quoted from by him, *Kuhns v. Wisconsin etc. Ry. Co.*, 76 Iowa, 71, there was a disputed question of fact as to whether there was a low joint in the railroad track at the place and time of the accident, and evidence was admitted to show that some sectionmen, discovering the accident, went to the place where the low joint was and raised it up to a level. This evidence was held admissible solely as tending to show the actual condition of the joint at the time of the accident; but the judgment was reversed, for the reason that the evidence had been admitted without any limitation as to its purpose, and the jury had been left at liberty to consider the evidence as an admission or confession of the defendant that the condition of the joint was the cause of the accident.

As the particular evidence in question was, in our judgment, inadmissible for any purpose, it is unnecessary to consider the contention of respondent to the effect that appellant should have had it limited by proper instruction to the purpose for which it may have been admissible.

It is further urged that if the evidence was improperly admitted, the error was not prejudicial, "in view of the admission of appellant that the machine was in a defective condition." We find no admission on the part of appellant, except such as may be shown by the particular evidence under consideration, to the effect that the knives were in such a condition as to render the machine unsafe for use. It was said of improperly admitted evidence in *Estate of James*, 124 Cal. 653, approvingly quoted in *Rulofson v. Billings*, 140 Cal. 452, 460: "If improper evidence under objection has been admitted, it is impossible for this court to say how much weight and influence it had in the mind of the trial court in framing its findings of fact. The improperly admitted evidence may have been all-powerful to that effect. As far as this court knows, it may have been that particular evidence which turned the scale and lost the case to the appellants. This must of necessity be the rule wherever improper evidence has been admitted which upon its face tends in any degree to affect the final conclusion of the court."

This is manifestly applicable to the case at bar. Under the circumstances here appearing, it is impossible for this court

to say how far the evidence as to the sharpening of the knives subsequent to the accident, tending to show an admission on the part of defendant's foreman to the effect that the accident was due to an unsafe condition of the knives, operated to induce a verdict for plaintiff. As said in the case quoted from, it may have been all-powerful to that effect.

It is unnecessary to discuss any of the other questions presented. We have sufficiently indicated our views as to the general questions presented, for all the purposes of a new trial.

The judgment and order are reversed.

Shaw, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[S. F. No. 3880. In Bank.—November 12, 1904.]

In the Matter of the Contested Election of THOMAS W. TREANOR, Contestee, Appellant, v. C. R. WILLIAMS, Contestant, Respondent.

ELECTIONS—CONTEST—INSUFFICIENT DEPOSIT OF BALLOTS—ERROR NOT SHOWN.—Where it was stipulated that all of the ballots objected to by either party should be withdrawn from the clerk's office by the party appealing, and be deposited with the clerk of this court, and the contestee appellant only deposited twenty-eight out of two hundred and fifty-one ballots rejected for the contestant, and no other ballots were deposited, no error is shown in counting or rejecting any of them.

IN.—STATEMENT OF CONTEST—RESULT OF CANVASS—NUMBER OF LEGAL VOTES CAST—ISSUES—FINDING—VARIANCE—SUPPORT OF JUDGMENT.—Where the statement of contest showed the result of the canvass by the election board in counting 4,862 votes alleged to have been cast for the contestee, without alleging that they were legally cast, and also alleged misconduct of election boards in counting for the contestee ballots which were actually cast for the contestant, and further alleged that the contestant received 5,083 legal votes, and that the contestee received a less number of legal votes than the contestant at said election, and the case was tried without objection, upon the theory that the court was called upon to decide which of the parties actually received the greatest number of legal votes, a finding that the contestant received 4,004 legal votes and that

the contestee received 4,001 legal votes, does not show a material or prejudicial variance from the statement as to the 4,862 votes, and is sufficient upon appeal to support a judgment for the contestant. [Beatty, G. J., dissenting.]

ID.—ILLEGAL BALLOTS—DISTINGUISHING MARKS.—The court did not err in rejecting all ballots as illegal which had crosses after the words "No nomination, ' as containing a distinguishing mark. The fact that there were a large number of such ballots does not affect the rule; and the intent of the voter cannot be shown other than by what appears upon the face of the ballot.

ID.—INTEGRITY OF BALLOTS.—Where the pouches containing the ballots were shown to have come from the clerk's office in the same condition as when they were received there, and there was no circumstance to raise a suspicion as to their integrity, an objection to the opening of the pouches by the court is without merit.

ID.—PURITY OF ELECTION LAW—IRRELEVANT QUESTION.—The question whether contestant had complied with the Purity of Election Law, and as to the failure of the court to find thereupon, need not be considered. The matter is irrelevant to an election contest.

APPEAL from a judgment of the Superior Court of the County of Santa Clara. A. L. Rhodes, Judge.

The facts are stated in the opinion of the court.

James H. Campbell, and S. F. Leib, for Appellant.

A. H. Upton, and Rogers, Bloomingdale & Free, for Respondent.

McFARLAND, J.—This is a contest over the office of county recorder of the county of Santa Clara, arising out of an election for that office held in November, 1902. Upon the returns of the election boards the board of election canvassers declared that Thomas W. Treanor had received the highest number of votes for said office and was elected, and a certificate of his election was issued and delivered to him. Thereupon C. R. Williams, who had been a candidate for said office at said election, duly instituted this contest. The court below found that Williams had received 4,004 legal votes, and Treanor only 4,001 legal votes, and rendered judgment for Williams. From this judgment Treanor appeals.

It appears from the record that the court examined all the votes that had been received at the election, and rejected a great many that had been counted by the election boards for

the contestee, Treanor, and also rejected a large number of votes which had been so counted for contestant, Williams. It was stipulated that none of the ballots offered in evidence need be copied into a bill of exceptions or statement, but that all of the ballots objected to by either of the parties should be withdrawn from the clerk's office "*by the party* who should appeal to the supreme court from the judgment that might be rendered in the action to which he is a party, and be deposited with the clerk of the supreme court upon filing his transcript on appeal," and that they might be used on the hearing here as though they had been copied into the bill of exceptions. Under this stipulation appellant has deposited with the clerk of this court, and thus brought to our attention, only twenty-eight of such ballots. But these ballots so brought here are of no materiality whatever, because they all contain votes for contestant which were rejected by the court. The record shows that "the court, upon objection of the contestee, rejected 251 of said ballots on the grounds" (naming several specific objections) "said ballots having been counted for contestant by the boards of judges and election officers of the respective precincts." The record further shows that "the said contestee, Treanor, specially objected to each of the following ballots containing a vote for said contestant Williams, said ballots *being a portion* of the 251 ballots above mentioned"; and then follows a reference to each of the said twenty-eight ballots deposited with the clerk of this court, and certain specific objections to each. We can see no purpose in this, unless it be that the contestee was fearful that the grounds on which the court rejected said ballots might turn out to be untenable, and he desired to add further grounds; but as 251 ballots, including the said twenty-eight ballots, which had been counted for contestant by the election boards were actually rejected by the court, the contestee has nothing to complain of on this point. And as none of the other ballots—amounting to several thousands—are here, we have nothing before us to show whether or not the court committed any error in counting or rejecting any one of those ballots. The judgment must therefore be affirmed, unless appellant has some valid objection to its validity which goes to some point other than the ruling of the court on particular ballots; and we do not think there is any such valid objection

The main objection is, that the court found that contestee received only 4,001 legal votes, and that this finding is at variance and in conflict with an alleged averment in the complaint, or "statement of contest," that contestee received 4,862 legal votes. But there is no specific averment that contestee received 4,862 legal votes. There is an averment that the election boards counted for the contestee, Treanor, "ballots which were not cast or voted for said contestee, but were cast and voted for this contestant, for said office"; and there is an averment that in the tabulated statement attached to the complaint designated as exhibit A, column G thereof, which foots up 4,862, shows the votes actually cast in said respective precincts for said Thomas W. Treanor; and appellant's contention is, that this last averment as to column G precluded respondent from claiming, and the court from finding, that appellant had less than 4,862 legal votes. But taking the two averments above mentioned together, the phrase "actually cast" in the latter averment is apparently used in the same sense as in the former averment, where it clearly means that ballots containing the name of contestant were "counted and tallied or caused to be read" for contestee. And this would be a warrantable construction even if the rules applicable to ordinary civil actions applied here; while under the provisions of the code relating to election contests a "statement of contest" is sufficient if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which said election is contested. (Code Civ. Proc., sec. 1117. See *Abbott v. Hartley*, 143 Cal. 484.) The statement in the case at bar alleges various acts of misconduct by the election boards by which votes were counted for contestee which should not have been counted for him, and votes which should have been counted for contestant which were not so counted, and then avers that contestant actually received 5,083 or more "legal votes" and that the contestee "actually received a less number of legal votes than the contestant at such election." These averments fully present the real question which the court was called upon to decide—namely, who of the two parties actually received the greater number of legal votes. The case was tried on this theory without objection, and the attention of the court was not in any way called to what is now claimed to be

a variance; and it is quite clear that appellant was in no way prejudiced by the alleged variance, even if it could be held that there was such a variance.

It is contended that the court erred in rejecting ballots because they had crosses after "No nomination"; but this point has been definitely settled against appellant's contention, and the fact that there were a large number of such ballots does not affect the rule (*McMenomy v. Buch*, 142 Cal. 77; *Merkley v. Trainor*, 142 Cal. 265); and the intent of the voter in making the distinguishing mark "cannot be shown other than by what appears upon the face of the ballot." (*Maddux v. Walthall*, 141 Cal. 412.)

The objection to the opening of the ballot-pouches was without merit; they came from the clerk's office in the same condition as when received there, and there was no circumstance whatever to raise the slightest suspicion of their integrity.

The objections to contestant's want of compliance with the Purity of Election Law, and the fact that the court did not find on that subject, need not be considered; whether or not a contestant had complied with that law is a matter irrelevant to an election contest. (*Maddux v. Walthall*, 141 Cal. 412.)

As to the matter of voters who were illegally assisted, we cannot say, upon the evidence in the record, that the court erred in holding that not more than four of them voted for contestant. There is not even a fair doubt of the correctness of the ruling of more than one, or at the utmost two, of the other votes, and a different ruling as to them would not change the result.

There is no other point made by appellant that is tenable or that calls for special notice.

The judgment appealed from is affirmed.

Angellotti, J., Van Dyke, J., and Henshaw, J., concurred.

SHAW, J., concurring.—I concur in the judgment on the ground that the case having been tried and submitted to the court below on the theory that the pleadings did not contain a conclusive admission that the contestee, Treanor, received 4,862 legal votes, it is too late in this court to present a differ-

ent construction of the pleadings, and claim here, for the first time, that the contestant is bound by the admission. (*King v. Davis*, 34 Cal. 106; *Lee v. Figg*, 37 Cal. 336;¹ *Hutchins v. Castile*, 48 Cal. 156; *Hughes v. Wheeler*, 76 Cal. 230; *Sukeforth v. Lord*, 87 Cal. 403; *Willey v. Crocker etc. Bank*, 141 Cal. 518.) I do not agree with the construction put upon the pleadings in this respect in the principal opinion. I concur in all other points.

BEATTY, C. J., dissenting.—I dissent. The finding that Treanor received only 4,401 votes is in conflict with the fact clearly established by the pleadings that he received 4,862 votes. If the evidence established the fact as found, the pleadings might have been amended to conform to the proofs, but they were not amended, and must prevail. I cannot see any grounds for holding that the case was tried upon any theory as to the effect of the pleadings which precludes the contestee from raising this objection to the findings. No doubt it is technical, but the whole contest is based upon grounds equally technical.

Rehearing denied.

[Sac. No. 1206. In Bank.—November 12, 1904.]

H. L. HUSTON, Contestant, Respondent, v. W. A. ANDERSON, Contestee, Appellant.

ELECTIONS—CONTEST—CUSTODY OF BALLOTS—SUFFICIENCY OF EVIDENCE—BURDEN OF PROOF UPON CONTESTEE.—Where it appears from the evidence that the envelopes containing the ballots were in the same condition as received by the clerk,—intact and unopened,—in the absence of evidence on the part of the contestee, who has the burden of proof to show that they were tampered with, or exposed under such circumstances that they may have been tampered with, or any evidence even raising a suspicion that they were disturbed and tampered with, the ballots were properly admitted in evidence. The burden of proof is not sustained by a naked showing that the ballots might have been more securely kept, and that it was possible for one to have molested them.

¹199 Am. Dec. 271.

ID.—LEGALITY OF VOTERS—REGISTRATION—IRREGULAR AFFIDAVITS.—

Voters who were in fact enrolled upon the great register, and whose purported affidavits, apparently proper in form, were contained in the book of affidavits delivered by the county clerk to the board of election of the proper precinct, and who were allowed to vote at the election, cannot be held, after the election, to be illegal voters simply because their affidavits had not been in fact sworn to before the county clerk or any of his deputies.

ID.—USE OF AFFIDAVITS IN PRECINCTS—OBJECT OF LAW—LIST OF REGISTERED VOTERS OF PRECINCT.—

The object of the law as to the use of the affidavits of the registered voters at the precincts was simply to dispense with the printed copies of the great register, and to afford an authenticated list of qualified voters for the precinct who have in fact been enrolled by the registration officer upon the great register.

ID.—QUALIFICATIONS OF ELECTORS—EFFECT OF AMENDMENT OF CODE.—

The fact that section 1083 of the Political Code prior to the amendment of 1899 provided that persons who were otherwise qualified, and whose names were enrolled upon the great register, were declared to be qualified electors, and that under that section as amended in 1899 qualified electors are only those "who have conformed to the law governing the registration of voters," does not show any material change in the law affecting the question of the qualification of electors, or affecting the rule that a mere irregularity in the method by which registration was secured does not render illegal the votes of registered voters.

ID.—ILLEGAL VOTES—IMPROPER ASSISTANCE OF VOTERS—SHOWING REQUIRED.—

Votes cast by persons assisted to vote by the election officers are illegal under section 1208 of the Political Code, as amended in 1899, unless it appears from the register that each of them "has declared under oath, when he registered, that he cannot read, or that by reason of physical disability he is unable to mark his ballot."

ID.—INQUIRY AS TO PERSONS VOTED FOR—ERROR NOT GROUND FOR REVERSAL.—

Where it appears that persons who were in fact under disability when registered, but who did not then declare on oath their disability, or who declared the contrary, were illegally assisted by members of the board, the court erred in refusing to allow the appellant to inquire how the parties depositing such votes voted as to the office in question; but such error is not ground for reversal where, conceding that they all voted for respondent, he would still have a majority of the votes legally cast.

ID.—VOTER UNABLE TO READ ENGLISH LANGUAGE—RIGHT TO ASSISTANCE—

TIME OF OATH OF OFFICERS.—Where an affidavit for registration showed the inability of the registered voter to read the constitution in the English language, such voter had the right, on demand, to assistance, regardless of whether or not he had also stated that he could mark his ballot; and the mere fact that the proper oath of

the election officers who assisted him was not taken until immediately after they had assisted him does not invalidate his vote.

- ID.—LEGAL RESIDENCE OF VOTER.**—Where residence is spoken of in connection with the right of a person to vote, "legal residence" is meant. Every person has in law a residence, which cannot be lost until another is gained. A voter who temporarily removed from the precinct where he was registered, without the intention of making the place to which he removed his home, did not lose his legal residence in the precinct where he was registered, notwithstanding he may not have had any certain house, room, or place therein that he called his home. The question of legal residence is one of fact upon which the finding of the court will not be disturbed.
- ID.—DISTINGUISHING MARKS UPON BALLOTS—CROSS IN BLANK SPACE—DOUBLE CROSS.**—A cross in a blank space and a double cross after a name are each distinguishing marks which vitiate ballots containing them.
- ID.—MARKS NOT DISTINGUISHING.**—Under the law as it stood at the general election in 1902, a cross on the parallelogram containing the candidate's name and a cross on the words "Yes" or "No" in voting for a constitutional amendment, instead of in the blank space after the same, are not distinguishing marks.
- ID.—INCORRECT DESIGNATION OF VOTING PRECINCTS IN AFFIDAVITS—CORRECTION BY CLERK—LEGALITY OF VOTES NOT AFFECTED.**—An incorrect designation of voting precincts in affidavits for registration, which were corrected by the clerk before the time for registration expired, does not render the registration illegal, where the voters registered actually resided in the precincts as corrected by the clerk at the time of their registration, and the correction was made simply to conform to the facts.
- ID.—ABSENCE OF CERTIFICATE TO OATH—PRESUMPTION—VOTER NOT PREJUDICED.**—Where the registration of a voter was made by a deputy clerk, who failed to certify the registration affidavit, it is to be presumed that the deputy discharged his duty, so far as to administering the necessary oath; and the voter cannot be deprived of his vote by the mere neglect of the deputy to perform his duty by certifying the fact of the oath.
- ID.—INITIALS OF ELECTION OFFICERS UPON BALLOT.**—Initials upon a ballot which were presumably the initials of election officers, placed thereon during the canvass of the votes, are not a distinguishing mark which vitiates the ballot.

APPEAL from a judgment of the Superior Court of Yolo County. J. W. Hughes, Judge presiding.

The facts are stated in the opinions of the court delivered upon the present and former hearings.

Clark & Clark, and E. R. Bush, for Appellant.

Arthur C. Huston, Charles W. Thomas, and Benjamin A. Martin, for Respondent.

ANGELLOTTI, J.—This an election contest, the office in question being that of district attorney of Yolo County. It has once been decided by this court in Bank (*post*, p. 331), but, upon petition of both parties, the decision was vacated and a rehearing granted, for the purpose of reconsidering some of the questions involved. Most of the material facts are stated in the opinions, majority and dissenting, heretofore filed.

By the former decision, it was held that upon the face of the legal ballots the respondent had a majority of twenty-one votes, but that the trial court had erred in its conclusion that twenty electors who had voted at the election, but who had the assistance of election officers in the marking of their ballots, although it did not appear from the register that they could not read or by reason of physical disqualification could not mark their ballots, were legal voters. It was also held that there was a similar error in holding that five electors of Knight's Landing Precinct who had not made an affidavit for registration before a proper registration officer were legal voters. The judgment was therefore reversed and the cause remanded for a new trial, such new trial to be confined to the ascertainment of the fact as to how the twenty-five so-called illegal voters voted on the office of district attorney, and the trial court was directed "upon a basis of twenty-one majority in favor of plaintiff ascertained by us from the legal votes cast, to determine from the evidence of such illegal voters whether this majority is lessened, equaled, or overcome, and render a judgment accordingly."

1. Upon a further consideration of the question as to the legality of the five Knight's Landing voters, we are satisfied that they should be held to be legal voters. Our views upon the law applicable to the facts concerning these voters, as the same are set forth in the opinions in this case heretofore filed, are stated in the dissenting opinion filed on the former decision.

In addition to the authorities therein cited in support of the proposition that where a person was in fact entitled to vote, if registered, and he did in good faith attempt to com-

ply with the law in regard to registration, and his name did in fact appear upon the register furnished by the proper officer to the election officers, and he was allowed to vote, he will not, after the election, be held to have been an illegal voter simply for the reason that there was some irregularity or informality in the method by which he was registered, the following cases are cited, viz.: *State v. Sadler*, 25 Nev. 131, 174;¹ *Stinson v. Sweeny*, 17 Nev. 309; and *Lane v. Bailey*, (Mont.) 75 Pac. 192. See, also, note to *Patton v. Watkins*, 90 Am. St. Rep. 58.

In addition to what was said in such dissenting opinion, it may be said that it is apparent from an examination of the code provisions applicable thereto, that no material change was made in this regard by the amendment of section 1083 of the Political Code in 1899. Much reliance is placed upon the fact that under the section, as it originally stood, persons, otherwise qualified, whose names were "enrolled upon the great register" were declared to be qualified electors, while under the section as amended in 1899 only those who have "conformed to the law governing the registration of voters" are declared to be such qualified electors. Taken in connection with the other provisions of the code, these expressions mean practically the same thing,—viz., that those who have caused themselves to be enrolled by the proper officer upon the authentic list of electors of the county are qualified electors thereof. We are speaking, of course, of those who were in fact otherwise entitled to vote.

Learned counsel for appellant are mistaken in their contention that there is no such thing as a great register other than the affidavits made by the electors. By the act amending section 1083 of the Political Code, and providing for the use of affidavits as a register in the various precincts (Stats. 1899, p. 59), sections relative to the keeping of the great register, the entry of names therein, etc., (Pol. Code, secs. 1094-1097, 1103, 1105,) were also amended. Under these sections, as so amended, it is the duty of the person charged with the registration of voters to keep in his office "*a register in which shall be entered the names of the qualified electors*" (sec. 1094), and *therein* to enter the names of the qualified electors (sec. 1095), the *entry* to show certain facts (sec.

¹ 83 Am. St. Rep. 573.

1096), such *entry* to be made on affidavit showing the facts required to be stated in the entry (sec. 1097), and to leave *in such register a blank* for cancellation, which is to be made by "*writing in such blank* the word 'canceled,' and a statement of the reasons therefor, *and by writing in red ink across the face of the affidavit used in procuring such registration the same words as are used in making the cancellation in the great register*" (sec. 1105). By the same act the officer is required to "preserve all affidavits made before himself or his deputies *for the purpose of procuring registration*" (sec. 1103), within fifteen days after the close of registration, arrange such affidavits for each precinct and bind them into a book (sec. 1113,) which, together with printed indices, shall be delivered by him to the respective boards of election, and this book of affidavits "*shall constitute the register to be used at such election*" in the precinct (secs. 1115 and 1116).

The plain object of this legislation as to the use of the affidavits at the precincts, instead of a printed copy of the great register, which was formerly used by the election officers, was simply to dispense with the necessity of printing copies of the great register. Under it, what purport to be the affidavits used "*for the purpose of procuring registration*" simply take the place of the printed copy of the great register which was formerly used. They no more constitute the register itself than did such printed copy, and when the law says that a book of precinct affidavits "*shall constitute the register to be used at such election,*" it simply means that such book shall constitute the list of voters authenticated by the proper officer as qualified electors of the precinct, which is to be used by the election board. It is an official list of the electors who have in fact been enrolled by the registration officer upon the great register as electors of the precinct. In the official list in use at Knight's Landing Precinct appeared the names and purported affidavits of these five electors. It thus appeared that they had in fact been enrolled by the registration officer in the great register of the county. Having been so enrolled by the registration officer, and being in fact electors of the precinct entitled to vote if registered, they were qualified electors thereof.

2. In regard to the twenty assisted voters, we adhere to the general views expressed in the opinion heretofore filed.

There is no question presented by the record in this case as to the effect of the failure of the registration officer to obtain the necessary information from the elector for the entry to be made on the affidavit and register, or, such information having been obtained, to properly record the same. If it appeared that it was the fault of the registration officer that the register failed to show that the electors, who were in fact unable to mark their ballots, had declared, under oath, when registered, that they could not read, or that by reason of physical disability they were unable to mark their ballots, a different question would be presented, which question it is unnecessary for us to consider on this appeal.

It appeared generally from the affidavits that each of these voters had sworn to a statement that he could read the constitution in the English language, write his name, and mark his ballot. Apart from the undisputed fact that they were not able to mark their ballots, and the fact that some of the affidavits were signed by mark and some by another person at the request of the deponent, there is nothing to indicate that the registration officer did not fully question them as to these matters at the time of registration, or that he did not correctly enter their statements in regard thereto. These facts are not sufficient to support a conclusion that the registration officer did not fully perform his duty in this matter. To so hold would be to practically abolish the statute as to assisted voters.

By the petition for rehearing presented by respondent, it was specially urged that as to the assisted voters, Hiller, Washabaugh, Hill, Gibson, Alexander, Brannigan, and Pulze, the register sufficiently showed them entitled to assistance. The affidavit of Hiller stated that he could read, write, and mark his ballot. The additional statement contained therein, to the effect that he was an invalid, did not show him to be entitled to assistance.

The affidavits of Alexander, Washabaugh, Hill, Gibson, and Brannigan stated that they were not able to write their names, but that they could read the constitution in the English language and mark their ballots. The fact that the registration officer did ascertain and enter the statement that these electors could not write supports the theory that he ques-

tioned them as to all the matters required by subdivision 11 of section 1096 of the Political Code to be shown in the entry in the great register, and correctly set forth their answers thereon. The fact that the register showed that these electors had declared on oath that they could not write their names did not entitle them to assistance. Section 1208 of the Political Code alone prescribes the conditions upon which such assistance may be given, viz.: "When it appears from the register that any elector has declared under oath, when he registered, *that he cannot read, or that by reason of physical disability he is unable to mark his ballot.*" These facts are to be ascertained, as contended by plaintiff, from the entry made on the great register under section 1096 of the Political Code, which provides that such entry must show,—“11. The fact whether or not the elector desiring to be registered is able to read the constitution in the English language and to write his name, and whether or not the elector has any physical disability by reason of which he cannot mark his ballot; and if he cannot mark his ballot by reason of physical disability, then the nature of such disability must be entered.” Under section 1097 of the Political Code the affidavit for registration of the voter must show all the facts required to be stated in the entry on the register, except the date of entry. But there is nothing in these provisions to detract from the force of the provisions of section 1208 of the Political Code, even though they were enacted subsequent to the enactment of said section 1208, which is not the case. The provisions referred to above constituted portions of sections 1096 and 1097 at the time of the enactment of section 1208 in its present form, and the subsequent amendments of sections 1096 and 1097 made no change in such provisions.

Upon further consideration of the case of the voter Pulze, we are satisfied that the register showed a case in which, under the provisions of section 1208 of the Political Code, the voter was entitled to assistance. The blank form of affidavit used in the case of this voter was so filled in as to show that he declared under oath at the time of registration that he could not read the constitution in the English language. This presented a case where, under the express provision of the statute, the voter was entitled, on demand, to assistance, regardless of whether or not he had also stated that he could

mark his ballot. It further appeared that he was in fact not able to read or write.

There was evidence sufficient to justify the court in finding that the election officers assisting him did take the oath prescribed by law, to the effect that they would not give any information regarding the manner in which his ballot was marked, and the mere fact that such oath was not taken until immediately after they assisted him should not be held to invalidate his vote.

It follows that Pulze must be taken from the list of illegally assisted voters.

3. It was contended on rehearing by the appellant, and the point was made in his petition for a rehearing, that the voter Walter Grim was an illegal voter, for the reason that he was not on the day of the election a resident of the precinct wherein he voted. He was held by the trial court to have been a legal voter, and the appellant was therefore not allowed to show how he voted. We cannot disturb the finding of the lower court as to this voter. The evidence was sufficient to sustain a conclusion that he had no intention of making the precinct into which he moved his residence. He said that he went there to undertake temporary employment only, intended to return to Woodland when he completed such employment, and did not intend to give up Woodland as his home when he left.

When residence is spoken of in connection with the right of a person to vote, "legal residence" is meant. Every person has in law a residence, and a residence cannot be lost until another is gained. (Pol. Code, sec. 52, subd. 3.) By subdivision 4 of section 1239 of the Political Code it is declared that a person must not be considered to have gained a residence in any precinct into which he comes for temporary purposes merely, without the intention of making such precinct his home, and by subdivision 9 of the same section it is provided that "The mere intention to acquire a new residence, without the fact of removal, avails nothing; *neither does the fact of removal, without the intention.*" If the voter had no intention of making the precinct into which he moved his home, but went there for temporary purposes only, he did not gain a residence there, and consequently did not lose his legal residence in the precinct from which he moved, notwithstanding

that he may not have had any certain house, room, or place therein that he could call his home. That precinct continued to be his legal residence until he gained a legal residence elsewhere. The evidence was such that it might have sustained a contrary finding, but not such as to warrant us in disturbing the finding of the court below. (See, in this connection, *Smith v. Thomas*, 121 Cal. 533; *Stewart v. Kyser*, 105 Cal. 459.)

4. Upon a further examination of defendant's ballot No. 189, a vote for respondent counted over appellant's objection, we are satisfied that the objection made thereto by appellant was good, and that the vote should not have been counted. There was a plain and distinct impression of a cross in the blank space under the column of socialist candidates. This, under the authorities, must be held to have invalidated the ballot. This error, however, is more than offset by a mistake in the former opinion, in regard to defendant's ballot, or objection, 153. In such opinion it was stated that the court erred in overruling thirty objections of defendant to ballots voted for plaintiff, including No. 153. This ballot was therefore by this court deducted from plaintiff.

It appears from the record of the case that the trial court did in fact sustain defendant's objection to this ballot, and it therefore was not counted for plaintiff in the lower court. It further appears that the only objection to the ballot was one that, as will appear hereinafter, we do not consider to have been a valid objection,—viz., that the voter, in expressing his choice as to constitutional amendments, had placed the cross on the words "Yes" or "No" instead of in the voting square to the right thereof. The objection should not therefore have been sustained by the trial court. Plaintiff should have been credited by us with another vote, instead of being deprived of a vote.

5. As to the other points made by the parties on rehearing, we adhere to the views announced in the original opinion. We have carefully considered appellant's contention relative to "defendant's ballot No. 1." There was, it is true, a tear extending from the top down through a portion of the ballot, but there was no "piece torn out of the top of the ballot," as urged by the objection. The tear was not the kind of mark that a voter would ordinarily place upon a ballot to serve as a

distinguishing mark, and there is nothing in the appearance of this tear to indicate that it was not made accidentally or unconsciously, and, conceding for the purposes of the case that it was among the ballots that had been rejected by the election board, we cannot say that the evidence was such as to compel the conclusion that the tear had been made by the voter. As to another objection made to the ballot,—viz., that the name "R. L. Ogden" had been written on the back thereof,—it appears that the name "R. L. Ogden" was not written thereon, but that the initials "W. H." and "R. L. O." in different handwriting had been written on the back in the upper left-hand corner. There was no pretense in the trial court that these were not, as they appeared to be, initials of some of the election officers, placed on the ballot by them at some time during the canvass by the board of election. The trial court was fully justified in concluding that they were not placed thereon by the voter or prior to the deposit of the ballot in the ballot-box.

We have also fully considered appellant's contention as to the ballots where the cross stamped by the elector to indicate his vote as to constitutional amendments was placed upon the word "Yes" or "No," instead of in the voting square immediately to the right thereof. This question affects five ballots cast for respondent and one cast for appellant. Upon this point we adhere to the views expressed in the original opinion, and in the case of *Tout v. Hawkins*, 143 Cal. 104, and *Hannah v. Green*, 143 Cal. 19.

The rejection of ballot 189 and the rectifying of the error in regard to ballot 153 leave respondent with twenty-two majority.

According to the views of this court, there were only nineteen voters who may be held to have been illegal voters, and if it be conceded that each of those voted for respondent, he would still have three majority, which is sufficient to support the judgment in his favor.

It follows that the judgment of the superior court must be affirmed, and it is so ordered.

Shaw, J., and Van Dyke, J., concurred.

BEATTY, C. J.—I concur in the judgment of affirmance and in the opinion of Justice Angellotti, except as to the torn

ballot (defendant's ballot No. 1). I think the evidence shows it was torn by the voter and delivered to the officers in that condition. A deduction of this vote and of all the illegally assisted votes from respondent's score would not, however, change the result.

McFarland, J., and Henshaw, J., dissented.

LORIGAN, J.—I dissent, and adhere to the opinion heretofore delivered and published.

The following are the opinions, majority and dissenting, above referred to, which were delivered in Bank May 12, 1904:—

LORIGAN, J.—This is an election contest, the parties thereto having been rival candidates for the office of district attorney of Yolo County at the last general election. The defendant, upon the official canvass, was declared elected, and in due time plaintiff inaugurated this contest, based upon various grounds, which, upon the trial and upon this appeal, narrowed down to three points—the admission of the ballots in evidence, and rulings upon alleged illegal ballots, and as to illegal voters.

Upon the face of the returns, defendant had received 1,575 and the plaintiff 1,567 votes, the plurality of defendant being eight votes.

After counting the ballots in this contest, and rejecting the ballots of several illegal voters, the court below found that plaintiff had received 1,468 and defendant 1,457 votes, giving to plaintiff a plurality of eleven votes; hence this appeal.

Disposing now of the questions as they are presented:

1. Appellant insists that the court erred in admitting the ballots in evidence. This applies to the returns of every precinct in the county, the claim being, that these returns were not properly and safely kept by their legal custodian, the county clerk. It is unnecessary to comment at length on the evidence introduced upon this point. While it is true that the county clerk might have kept the ballots in a more secure manner than he did, yet it cannot be said that the evidence shows anything more than that fact, or that it raises any stronger inference than that, by reason of this lesser measure

of security the ballots might have been more easily tampered with than if greater precautions for their safety had been taken. It appears from the evidence that the envelopes containing the ballots were in the same condition as received by the clerk,—intact and unopened,—and there is no evidence even raising a suspicion that they were disturbed or tampered with. The lower court found that they were kept in substantial compliance with the law, and admitted them. As said in *Tebbe v. Smith*, 108 Cal. 107: “So, too, when a substantial compliance with the provisions of the statute has been shown, the burden of proof shifts to the contestee of establishing that, notwithstanding this compliance, the ballots have in fact been tampered with, or that they have been exposed under such circumstances that a violation of them might have taken place. But this proof is not made by a naked showing that it was possible for one to have molested them. The law cannot guard against a mere possibility, and no judgment of any of its courts is ever rendered upon one.

“When all this has been said it remains to be added that the question is one of fact, to be determined, in the first instance, by the jury or trial judge; and while the ballots should be admitted only after clear and satisfactory evidence of their integrity, yet, when they have been admitted, this court will not disturb the ruling, unless we in turn are as well satisfied that the evidence does not warrant it. In this case we do not think the ruling was erroneous.”

We think, too, that within this rule, the evidence sufficiently warranted the court in admitting the vote of Woodland Precinct No. 1, specially objected to by defendant.

2. As to illegal ballots: Upon the contest the plaintiff objected to 495 ballots and the defendant to 328, and the validity of the rulings of the court upon these objections is next presented for consideration. The original ballots (excepting some few instances where counsel apparently abandoned their objections and omitted them) by stipulation were transmitted to this court for examination under the objections. The number so transmitted exceeds seven hundred, and the objections urged embrace on one side or the other every conceivable objection which could be raised. We have examined the ballots thoroughly and considered the objections carefully, and, stating the result of such consideration generally, we find that

the court erred in sustaining objections made by plaintiff to nineteen ballots voted for defendant Anderson, and in overruling thirty-one objections of plaintiff to ballots likewise voted for defendant; and it erred likewise in sustaining objections of defendant to twenty-eight ballots cast for plaintiff Huston, and in overruling thirty objections of defendant to ballots likewise voted for plaintiff. As a result of these errors in sustaining or overruling objections, the plaintiff loses thirty votes and gains twenty-eight; the defendant loses thirty-one votes and gains nineteen votes, giving the plaintiff a gain upon this appeal of ten votes, which, with the eleven majority found in his favor by the lower court, makes his present majority twenty-one.

It can be of no benefit to the legal profession to set forth the particular objections urged to the ballots on either side. They involve no novel questions, and under the amendment to the Election Law by the last legislature may never arise again. It may be mentioned, however, that the court sustained objections upon both sides against counting ballots where the voter had stamped a cross on the parallelogram containing the candidate's name after the name, but not in the square, and had stamped a cross either under or on the words "Yes" or "No" in voting on constitutional amendments, and not in the square. As the law stood (Pol. Code, sec. 1205) when this election took place, the law did not require the cross to be stamped in the square, but only after the name of the candidate (*Tebbe v. Smith*, 108 Cal. 109), and as to constitutional amendments, against the answer he desired to give. So in neither case was the stamps a distinguishing mark. The ballots were therefore valid, and should have been counted.

While we do not consider that any practical purpose can be subserved by calling further particular attention to any of the objections urged, yet for the benefit of counsel in the case we will mention those objections by number which the court should have sustained or overruled on account of the sufficiency or insufficiency of the objections.

The court should have sustained plaintiff's objections Nos. 3, 59, 64, 74, 75, 77, 104, 117, 120, 121, 123, 124, 157, 158, 167, 176, 184, 185, 194, 215, 225, 237, 241, 251, 252, 258, 275, 278, 281, 290.

It should have also sustained those of defendant numbered

33, 63, 125, 142, 144, 153, 160, 172, 207, 214, 216, 235, 247, 259, 271, 282, 287, 293, 298, 312, 345, 360, 372, 409, 415, 434, 453, 468, 471, 475.

The following objections of plaintiff should have been overruled: Nos. 21, 92, 115, 119, 160, 161, 179, 198, 203, 207, 208, 214, 234, 248, 249, 268, 269, 272, 289. Likewise those of defendant numbered 10, 19, 20, 29, 50, 80, 89, 92, 159, 163, 165, 174, 185, 186, 213, 266, 290, 291, 303, 316, 317, 321, 368, 381, 435, 447, 467, 485.

The ballot numbered "Deft. 6," which is sent up here to point defendant's objection of the same number, is obviously not the ballot to which he objected, or which should have been marked as his exhibit. It contains a vote in his own favor, and has nothing upon it rendering it in the slightest degree open to the objection he made to it, or to any other objection. It is so apparent that the wrong exhibit was marked and sent up that we pay no attention to the objection.

Defendant's objection No. 399, made in the lower court, was against a ballot containing a vote in his own favor. It was overruled below, and he has urged on this appeal that the ruling was erroneous. The original objection was doubtless through an oversight of counsel, but as he has not abandoned this assignment of error, and presents it on this appeal, and as it is apparent that the ballot is open to the objection he urged against it—a double cross—we are compelled to pass on it, and find that his objection should have been sustained and the ballot rejected—though the effect is to lose him a vote.

Although upon this appeal the majority of the plaintiff has been increased, it cannot avail him for the purpose of an affirmance of the judgment, because, in our opinion, the court committed errors which if not committed might have had the effect of overcoming this majority in favor of defendant, and for these errors a new trial will have to be ordered.

These errors are as follows, and were committed by the court in ruling as to illegal voters:

3. In that regard it is insisted by appellant that the court erred in refusing to permit him to show, by an inquiry of them, how twenty certain persons who had voted at the election cast their votes for the office of district attorney. All these persons had on election day been, at their request, assisted in marking their ballots by members of the election

board at various precincts, and none of them had made oath on registering that he was unable to read or was under any physical disability. On the contrary, in addition to the absence of any statement of the existence of physical disability, it appeared from their affidavits of registration that they could all read and mark their ballots, except a voter, Pulze, who in his affidavit swore that he could not read the constitution in the English language, but could mark his ballot.

The law provides (Pol. Code, sec. 1208) the conditions under which voters who are unable to read, or are suffering from physical disability, may have assistance in marking their ballots. It declares that "When it appears from the register that any elector has declared under oath, when he registered, that he cannot read, or that by reason of physical disability he is unable to mark his ballot, he shall, upon request, receive the assistance of two of the officers of election of different political parties, in the marking thereof, to be chosen as follows:" etc.

It will be observed from the reading of this section that it is only when it appears "from the *register* that the elector declared under oath *when he registered* that he could not read, or was physically disabled from marking his ballot," that he shall receive assistance.

The existence of those matters which shall entitle a voter to assistance are required to appear in his affidavit of registration (Pol. Code, sec. 1096), and these affidavits constitute the precinct register to be used by the election board upon election day.

It will be found that the test provided for in section 1208 is the only one contained in the election law for determining whether a voter shall be given assistance or not, and it provides the only condition upon which assistance can be extended. No other test is provided for, and no other test is permissible. When the law has designated a condition under which a right may be exercised, it is necessary to a valid exercise of that right that such condition should exist. This conclusion is strengthened when we take into consideration previous legislation upon this subject.

When section 1208 of the Political Code was first adopted it provided that "any elector who declares under oath to the presiding election officer that he cannot read, and that by

reason thereof, or by reason of physical disability, he is unable to mark his ballot, shall, upon request, receive the assistance of any one of the election officers he may choose in the marking thereof," etc. (Stats. 1891, p. 175.)

This section was amended in 1893 (Stats. 1893, p. 307), but was not disturbed as to the oral oath.

In 1895 the section was amended into the present form, which abolished the right theretofore accorded to the voter of making, when he presented himself to vote, an oral oath of his inability to read, or of physical disability which prevented his marking his ballot, and requiring these facts warranting his assistance to appear in his affidavit of registration which would be in the precinct register in the hands of the election board, and an examination of which by them would conclusively determine his right under the law to assistance when he applied for it.

If an examination of the voter's affidavit in the precinct register is not the exclusive method of ascertaining his right to assistance, then the only other way he would be entitled to it would be by a simple request for it, or upon an oral oath establishing his necessity for it, made when he appeared to vote. Now, it cannot be claimed that either of these methods are provided for in the Election Law. No one would seriously contend that he would be entitled to it on a simple request, and if his oral oath was to be accepted (which was not even administered to any of these persons whose votes are here in question), why did the legislature adopt the idle ceremony of repealing the only provision of law which ever accorded it to him, and substituting his affidavit of registration as sole evidence of it?

We are satisfied from the language of the section, and in view of the previous legislation, that the legislature intended that the test of a voter's right to assistance should appear on, and be determined by, an examination of the register by the election officers (the affidavits of registration which constitute the precinct register), and that by amending the law which previously extended the right to make oral oath so as to require the necessary facts to appear in the affidavit of registration, that this latter method was intended by the legislature to be exclusive, and that the provision is mandatory.

We are mindful that cases may arise where the voter be-

tween the day of final registration and the day of election may become so physically incapacitated as to be unable to mark his ballot, and as such fact could not appear on the register, under the view we hold of the section, he could not be permitted to vote. What the rights of a voter under such circumstances would be,—whether (the law having failed to make provision for such a contingency, and only contemplating that the disabilities existing at the time of registration should appear in the affidavit of registration) the voter would be entitled to assistance upon taking an oath before the board of election,—is a matter not here involved, because it appears from the evidence that all the persons whose votes the appellant challenges as illegal suffered from the disabilities which they claimed on the day of election entitled them to assistance when they made their affidavits of registration.

We think these votes were illegal, and that the court erred in refusing to allow appellant to inquire how the parties depositing them voted.

Upon the general proposition of the illegality of these votes attention is directed to the cases of *Tebbe v. Smith*, 108 Cal. 113; *Patterson v. Hanley*, 136 Cal. 275, and *Summerson v. Schilling*, 94 Md. 591.

Evidence was taken upon the trial over appellant's objection which showed that these persons whose votes were challenged as illegal were in fact on the date of their registration either unable to read or by reason of physical disability unable to mark their ballots.

As the law, however, does not leave the question of the right of the voter to assistance to be determined by the court when the legality of such vote is challenged upon a contest, but requires the voter's right to assistance to appear from his affidavit as set forth in the precinct register, the court erred in refusing to permit appellant to question these parties as to how they voted.

In order to avoid any question upon a new trial as to the identity of these illegal voters, we give their names as appearing from the record (omitting their initials). They are Austin, Nickell, Alexander, Jones, Wilger, Pulze, Washbaugh, Hill, Gibson, Brannigan, Olsen, Harrington, Valine, Rose, Peters, Sacramento, La Montagne, Angelo, Thomas, Adams, and Hiller.

As to additional illegal voters the court also erred in refusing to permit the defendant to show how they had voted for district attorney. The evidence concerning these voters was, that the county clerk had appointed one F. B. Edson, who was engaged in a mercantile business with his brother, T. W. Edson, at Knight's Landing, as a deputy clerk to attend to the registration of voters in the election precinct of Knight's Landing.

During the absence of F. B. Edson, the deputy registration clerk, in the mountains, certain electors came to the store to be registered for the purpose of a party primary. Their registrations were made out by T. W. Edson, who signed the name of his brother thereto as deputy clerk, writing under that signature, as evidence of his action, "per T. W. E." T. W. Edson was not a deputy clerk, and no other registration of these persons was had. These parties were never legally registered, and their votes were illegal. It is contended by plaintiff that their registrations were taken before a *de facto* officer, and were valid. Conceding that if so taken before a *de facto* officer, they would be valid, still T. W. Edson was not a *de facto* officer. A *de facto* officer is one who, though not authorized by law to act in the official capacity he assumes, yet claims to be so authorized, and in fact does act as an officer. T. W. Edson claimed no right to act as deputy clerk; nor did he pretend to be such; neither was he reputed to be a deputy clerk. In fact he did not in these registrations assume to act as a deputy, but simply as a substitute for his brother, whose name he signed as the deputy, "per T. W. E." as his representative.

Any individual in possession of blank affidavits for registration could have prepared them in the same manner, and the same claim could as well be insisted on to sustain their validity.

As section 1083 of the Political Code stood prior to its amendment in 1899, the law required, in order to entitle an elector to vote, only that his "name shall be enrolled upon the great register of the county." The law then, as now, required an affidavit of registration to be made by the voter, but, prior to the amendment, facts contained in the affidavit were enrolled upon the great register, and the entry of the elector's name in the great register was the evidence of his right to

vote. The affidavit was no part of the register. The amendment of this section in 1899 changed this. It is no longer provided that the test of the right of an elector to vote shall be determined by his enrollment on the great register, but an entirely different test is provided, which now is, that he "shall have conformed to the law governing the registration of voters." And, as the law now requires that the affidavits of registration themselves shall constitute the precinct register upon which an elector is entitled to vote, it is essential, in order to so entitle him, that there should be a strict compliance with the law to the extent, at least, that his affidavit for registration should be made before either a *de jure* or *de facto* officer. These illegal voters were Reddington, Faulk, Roberts, Jenkins, and William Adams.

It is insisted by defendant that certain other persons were illegal voters by reason of non-residence in the precincts in which they voted, and that the court erred in not sustaining his inquiry as to how they voted.

Residence is a question of fact in which the intention of the party enters as an important element, and when the court has found upon the matter such finding will not be disturbed unless it appears that there is an absence of evidence to support it. We find no such condition in the record. There was evidence including the declared intention of all the parties upon the subject, from which the court was warranted in finding that they all resided in the precincts where they voted, and this finding concludes us from reviewing the matter. This applies to the finding by the court upon all claims of residence or non-residence in precincts which are urged by either party upon this appeal.

There is nothing in defendant's contention that certain electors were illegally registered. This claim is based on the fact that after certain voters had registered, it was ascertained that the affidavits of registration contained incorrect designations of their voting precincts, and, at their request, or at the suggestion of the outside deputy registration clerks, who had registered them, but were in doubt at the time as to the lines of the various precincts, and in some instances from his own knowledge, that the names of the precincts inserted were not correct, the county clerk corrected them by inserting the proper precinct names. All these voters in fact actually

resided, when they registered, in the precincts represented by the correction. That the wrong precincts were originally designated was clearly a mistake on the part of the deputy registration officers, or of the voters themselves, and the correction was simply to conform to the fact, and made long before the time for registration expired. Under these circumstances the corrections were properly made, and did not affect the validity of the registration.

Nor is there any merit in defendant's claim that one Marston was an illegal voter. His formal affidavit for registration signed by him was in the precinct register, but there was no jurat of the county clerk thereto showing that he had in fact been sworn. The evidence shows that Marston went to the county clerk's office to be registered, that the county clerk himself prepared his affidavit, and while Marston does not remember whether he took an oath before making it or not, he understood that he was making an affidavit. The clerk did not remember whether the oath was administered or not, but testified that it was usual for himself and deputies to swear the voters when they registered them. As it is made the duty of the clerk and deputies to administer the oath to parties applying for registration, and as the affidavit was inserted by the clerk in the precinct register as that of a person entitled to vote, the court was justified in presuming that the clerk discharged his duty and administered the necessary oath, but neglected certifying the fact. An elector is not required to see that the county clerk certifies his registration affidavit, and when he has done all that the law requires of him to effect registration, he cannot be deprived of his vote by the failure of the clerk to perform his duty.

We have now disposed of all the points raised on this appeal by either party, and from what we have said, the judgment of the lower court must be reversed and a new trial granted.

It only remains to determine to what extent the lower court should proceed upon such new trial.

As all the exceptions of both parties to the action of the lower court in the reception or rejection of ballots are presented in the record, and this court has passed upon them and determined upon review that, from the legal ballots cast, the plaintiff has a majority of twenty-one votes, this determina-

tion is final, and upon a new trial the lower court and the parties shall be confined to ascertaining how the persons who we have determined were illegal voters voted for the office of district attorney, and upon a basis of twenty-one majority in favor of plaintiff ascertained by us from the legal votes cast, determine from the evidence of such illegal voters whether this majority is lessened, equaled, or overcome, and render a judgment accordingly.

The judgment is reversed and a new trial ordered, limited to the extent that we have above indicated.

McFarland, J., Henshaw, J., and Beatty, C. J., concurred.

ANGELLOTTI, J., dissenting.—I am unable to concur in the judgment of reversal.

I concur in the opinion, except as to the portions thereof relating to assisted voters and to the voters whose purported affidavits were taken by T. W. Edson.

The first class numbered twenty and the second class five. I am not prepared to say that the twenty assisted voters were not illegal voters but in the view I take of the case it is unnecessary to determine whether or not they were.

By the recount plaintiff has twenty-one majority. Assuming all of the assisted voters to have been illegal voters, and that they all voted for him, he would still have a majority of one after the deduction of their votes.

To reverse the judgment it is therefore essential to hold, as does the majority opinion, that the five voters whose so-called affidavits were taken by T. W. Edson were also illegal voters. I cannot concur in this conclusion.

The evidence showed that each of these voters had resided in the precinct for over twenty years, and had voted in that precinct before. There is no claim that they did not possess all of the qualifications of electors as prescribed by the constitution. (Const., art. II, sec. 1.) They were electors of the precinct. (*Bergevin v. Curtz*, 127 Cal. 86.)

The objection is not that these voters were not electors of the precinct in which they voted, but that they had not "conformed to the law governing the registration of voters," which is by section 1083 of the Political Code, as amended in 1899, made a condition precedent to the right of an elector

to exercise the privilege of voting. It is well established that the legislature may make reasonable regulations for the registration of voters, for the purpose of providing "a means whereby the elector who is entitled to vote may be known by having his name enrolled upon an authentic list," and that it may require electors to comply therewith as a condition precedent to voting.

The validity of the provision of section 1083 of the Political Code relied on by defendant is not therefore to be doubted, but that provision means no more than that the elector shall have in good faith procured his registration as an elector, so that his name appears upon the authentic list provided by law.

This had been done in the case at bar. It is not claimed that the names of these five voters were not entered upon the great register of the county kept in the office of the county clerk (Pol. Code, secs. 1094-1096), and what purported to be the affidavits used for the purpose of procuring their registration (Pol. Code, sec. 1103) were contained in the book of affidavits delivered by the county clerk to the board of election of the precinct, to be used as the register at such election. (Pol. Code, sec. 1116.)

The purported affidavits signed by the voters were, on their face, without fault, the "Per T. W. E." referred to in the majority opinion having been stricken out in the office of the county clerk, and they had been received by that officer as sufficient affidavits for the purpose of registration.

The real objection is that the statements of the voters, forwarded by their procurance to the office of the clerk for the purpose of obtaining registration, had not in fact been sworn to by them before the county clerk or any of his deputies.

The provision that no name shall be entered upon the register of the clerk except upon an affidavit made before the clerk or one of his deputies is directed entirely to the county clerk (Pol. Code, sec. 1097; *State v. Lattimore*, 120 N. C. 426¹), and while the clerk should not register an applicant without such an affidavit being made, and while perhaps a registration made without the prerequisite of a sufficient affidavit might be canceled at the suit of any person as having been illegally made (Pol. Code, sec. 1109), the registration is not void.

¹ 58 Am. St. Rep. 797.

In *Davis v. O'Berry*, 93 Md. 708, it was held, in a proceeding to have a name erased from the registration-book, that a complete answer to the showing that the voter had not been sworn as required by law would be made by a showing that the voter in fact possessed all of the qualifications which would entitle him to be registered.

In *State v. Lattimore*, 120 N. C. 426,¹ it was held that where an elector's name appeared on the registration-book, he had a right to vote, whether he had been sworn prior to registration as required by law or not.

In *Tullos v. Lane*, 45 La. Ann. 333, it was held that where the registration had been carried on under verbal authority from the registrar by persons not having legal authority so to do, voters actually entitled to vote could not after an election be deprived of their constitutional right to have participated therein, by the simple fact of itself that the person who registered them was not legally authorized so to do. (See, also, *McCrary on Elections*, 4th ed., sec. 140.)

No case has been cited, and I have been unable to find any, where a person who was in fact entitled to vote if registered, and whose name was enrolled on the register, and who was allowed to vote, had been held after the election to have been an illegal voter, simply for the reason that there was some irregularity or informality in the method by which he was registered.

The majority opinion appears to concede that under the law as it stood prior to the amendments of 1899, a vote cast by such a person would have been a legal vote. I cannot see that there has been any material change made in this regard by such amendments.

Van Dyke, J., and Shaw, J., concurred in the dissenting opinion.

¹ 58 Am. St. Rep. 797.

[S. F. No. 397a. In Bank.—November 12, 1904.]

MARY FLOYD McADOO et al., Petitioners, v. M. S. SAYRE,
Judge of Superior Court of Lake County, Respondent.

TRUST UNDER WILL—JURISDICTION—DETERMINATION OF RIGHTS—TERMINATION OF TRUST—POWER TO ORDER PROPERTY DELIVERED.—Independent of the necessity to determine who are interested as beneficiaries under a trust created by will, arising from a dispute over specific items of an account rendered by the trustees, or over the right to contest the same, the superior court having jurisdiction over the trust, under section 1699 of the Code of Civil Procedure, has general power, upon final settlement at the termination of the trust, to declare it terminated, and to dispose of the entire matter of the trust, by determining who is entitled to the property, and directing the trustees to turn it over to the person or persons entitled thereto.

ID.—NATURE OF JURISDICTION.—Jurisdiction for a certain purpose necessarily includes authority to do all things necessary to accomplish that purpose which can be done by the means afforded.

ID.—NATURE OF ACCOUNTING BY TRUSTEES—DISPOSITION OF TRUST PROPERTY.—Trustees who have the possession of trust property, under the terms of the instrument creating the trust, are chargeable in their accounts with the whole of the estate committed to them, and they have not fully accounted until the entire estate is finally disposed of, and they will remain subject to be called to account until this is done and the trust is fully executed and the trustees are entitled to their discharge.

ID.—DUTY OF COURT.—The court has the power, under section 1699 of the Code of Civil Procedure, and it is its duty wherever the power is invoked, to ascertain who is entitled to the trust estate already delivered by the trustees, and also that which yet remains to be delivered, and to make such orders as may be necessary to enable the trustees to make final settlement with the beneficiary in safety and secure a final settlement of his account which will entitle him to a discharge.

ID.—PROHIBITION—REMEDY BY APPEAL.—The writ of prohibition will not lie to prevent action by the court, on the ground that the trustees had failed to comply with the provision of law requiring them to name the beneficiaries in their report, nor on the ground of anticipation of error by the court in ordering the property delivered to one who claims under the will of a deceased beneficiary before the time for contest of the will has expired, there being a sufficient remedy by appeal in each case.

APPLICATION for Writ of Prohibition to the Judge of
the Superior Court of Lake County. M. S. Sayre, Judge.

The facts are stated in the opinion of the court.

Maguire, Lindsay & Wyckoff, and Houx & Barrett, for Petitioners.

Bishop, Wheeler & Hoefler, Charles S. Wheeler, and John F. Davis, for Respondent.

SHAW, J.—This is an application for a writ of prohibition to prevent the defendant, as judge of the superior court of Lake county, from making an order declaring the trust terminated and directing certain testamentary trustees to pay over, convey, and deliver the trust property to the beneficiaries.

The facts are substantially as follows: Upon the final settlement of the estate of Cora Lyons Floyd a large amount of property was distributed to certain trustees in trust to hold the same during the lifetime of the daughter of deceased, to maintain and support the daughter during her life out of the income, and upon her death to pay over and deliver the same to the descendants of the daughter, or, if there were no descendants, to such person as the daughter should by will appoint, or, failing such appointment, to the petitioners herein. The daughter died on February 11, 1904, leaving no descendants. A document purporting to be her last will, whereby she bequeathed and devised all her estate to her husband, Milos Mitrov Gopcevic, was admitted to probate in the superior court of San Francisco County on March 9, 1904. In April, 1904, the trustees filed an account and report of the trust in the superior court of Lake County, entitled "In the Matter of the Estate of Cora Lyons Floyd, deceased," in which, in addition to a statement of their account and an inventory of the trust property, they alleged the marriage of the daughter to Gopcevic on October 6, 1903, her subsequent residence in San Francisco, her death there without issue, and that she left a will which had been admitted to probate. The account, due notice having been given in the mean time, came on for hearing on May 13, 1904. On that day the executors of the will of the daughter and Gopcevic, the surviving husband, filed an answer to the account and report of the trustees. The answer states the bequest and devise by the daughter to Gopcevic, her husband, alleges that by virtue

thereof all the property of the trust vested in said Gopcevic (Civ. Code, sec. 1330), and asks an order declaring the trust at an end and directing the trustees to pay over, convey, and deliver the property to him.

The cause thus presented was submitted to the court, and the respondent, as judge of said superior court, was about to determine the matters involved in the account and declare the balance due, and was considering whether or not the court had jurisdiction in that proceeding to determine who was entitled to the property and to order the trustees to pay over, convey and deliver the trust property to the person or persons entitled thereto. The purpose of the proceeding in this court is to prevent the lower court from proceeding to do anything more than to settle and declare the balance due on the account.

There is thus presented the question whether or not section 1699 of the Code of Civil Procedure confers upon the superior court, in the settlement of a trustee's account in the proceeding there established for that purpose, jurisdiction to ascertain and determine who are the persons entitled to the trust property, and, upon the final account, to direct the trustee to deliver the property to such persons in settlement of the trust, or to approve and confirm such delivery if already made by the trustee. The respondent contends that the court may in that proceeding do all these things. The petitioners claim that the power of the court is exhausted when it has adjusted all disputes as to the correctness of any items of the account and has allowed compensation and expenses to the trustee and declared the balance due.

Upon consideration of the questions usually involved in the settlement of the accounts of trustees of any class of trusts, it is apparent that the court having jurisdiction of the matter of such settlement, even if its functions be limited to the mere ascertainment of a balance, must frequently be called on to determine who is entitled to the property. One who has no interest in the trust has no standing in court to assail the account presented by the trustees, nor to move the court to require an account of them. The section in question gives the right to apply for an order on the trustees for an account, exclusively to the beneficiary or his guardian. Even if this provision were omitted, such right would still be lim-

ited to those having some interest in the trust or in the trust property. The trustee, then, has the right, when an account presented by him is attacked by objections at the hearing, or when he is cited to appear and render an account, to make the preliminary objection that the person who thus invokes the action of the court with respect to the trust has himself no interest in the property, and hence cannot be heard to make his objection or demand an accounting. This objection of the trustee may be disputed, and thereupon the court must determine whether or not such party is the beneficiary, or is interested in the trust. So, also, there may be, as in this case, two or more parties each claiming to be beneficiaries. In such a case the trustee may be justly entitled to credits if one of these parties is the real beneficiary, which he could not have if the other was the party interested. The account cannot be settled without a determination of the question as to which party is entitled. Considered as a mere matter of power, therefore, the court must have the authority in such a proceeding, whenever the necessity properly arises, to determine who are the persons entitled as beneficiaries.

But the precise question here involved is whether or not, independent of any necessity arising from a dispute over specific items of the account, or over the right to contest the same, the court has a general power, upon final settlement at the termination of the trust, to dispose of the entire matter of the trust by determining who, by the terms of the trust, is entitled to the property, and directing the trustees to turn over the same to such person. The decision of this question depends on the effect to be given to the language of section 1699 of the Code of Civil Procedure. That section declares that: "Where any trust has been created by or under any will to continue after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trusts." It also provides that such testamentary trustee may during the continuance of the trust, or at its termination, "render and pray for the settlement of his accounts as such trustee, before the superior court in which the will was probated, and in the manner provided for the settlement of the accounts of executors and administrators." Further provision is made for notice to be given

of the hearing, and for citation to compel the trustee to account, but these provisions are not important to the present question.

Jurisdiction for a certain purpose necessarily includes authority to do all things necessary to accomplish that purpose, which can be done by the means afforded. Every trustee who, by the terms of the instrument creating the trust, has possession or control of the trust property is chargeable in his accounts with the whole of the estate thus committed to his hands. Aside from his allowances for compensation and expenses, he cannot in his account obtain credit against this charge except as he may dispose of the trust property to a beneficiary in the lawful execution of the trust, in which case he is entitled to credit thereon for the property so disposed of, and when he has thus disposed of it all his account then stands balanced, and then only has he fully accounted and become entitled to his discharge. He may, if he chooses, exercise his own judgment as to the beneficiary, and, upon the termination of the trust, deliver the property to such person before presenting his accounts for settlement, or he may present his account for compensation and expenses and obtain settlement to that extent before proceeding to make settlement with the beneficiary, and then present for settlement a supplementary account for the balance. But in either case he has not fully accounted until he has thus disposed of the entire estate, and he will remain subject to be called on to account until this is done and until the court having jurisdiction of the accounts has, upon a hearing, declared the account correct and the trust fully executed. The object of the section under consideration was to provide a convenient and effectual method of procedure by which to secure a judicial determination, binding on all persons interested, that the estate is all accounted for, the accounts fully settled, and the trust executed.

It follows from these propositions that the settlement of the final account of a testamentary trustee in accordance with the provisions of this section will necessarily involve a decision as to the effect of the instrument by which the trust was created, in order to ascertain who is entitled to the trust estate, and determine whether or not the trustee has properly disposed of it in the execution of the trust. In many cases

as above stated, a determination of this question will be necessary upon the settlement of the current accounts, but in the case of a final account, showing a complete execution of the trust, it will be necessary in every case.

The necessity of this is shown in the provisions of the code respecting the settlement of the accounts of executors and administrators. They are made chargeable in their accounts with all the estate which comes to their hands. (Code Civ. Proc., sec. 1613.) Upon the settlement of an account allowing compensation and expenses, the courts must thereupon make an order for the payment of the debts,—that is, it must determine to that extent who are the beneficiaries, and order the execution of the trust to that extent of payment to them. (Code Civ. Proc., sec. 1647.) If this exhausts the estate the account is final, but a supplementary accounting must be made showing the payments made under the order. (Ibid.) And when, after the debts have been paid, the balance still remaining has been ordered distributed by the court, the executor or administrator is not entitled to a discharge until he has further accounted to the court for this balance by showing that he has paid or delivered the property to the parties entitled thereto. (Code Civ. Proc., sec. 1697.) This latter is not usually styled an account, but it has all the essential attributes thereof, and although the code does not require notice to be given thereof, there can be no doubt that the court would have power, if occasion arose, to require a notice to the distributees in order to facilitate a determination of the question whether or not the delivery had been made at all, and, if made, whether it was to the proper parties. It is true that in this state the distribution of estates has been made to some extent a matter distinct from the settlement of the accounts. But it is clearly made so merely for convenience. If those provisions of the code were omitted the court would still be compelled to ascertain and declare the interests of the successors, in order to adjudge whether or not the accounts were correctly rendered.

Furthermore, in the case of bills for an accounting in equity, the proceeding has always been to ascertain who was entitled to the balance found on hand, and give judgment accordingly in his favor against the trustee. The forms of interlocutory decrees in such cases include a judgment of this

character, to become effective on the approval of the account. (3 Daniell on Chancery Practice, *2193, *2238; 2 Lindley on Partnership, *516; 22 Ency. of Plead. & Prac. 107; 1 Cyc. Law & Proc. 448; *Keogh v. Noble*, 136 Cal. 153.) The question as to who were entitled to the trust estate was usually settled in a preliminary inquiry concerning the necessary parties. (1 Daniell on Chancery Practice, *216, *217; 1 Pomeroy's Equity Jurisprudence, sec. 112, p. 119; *Alison v. Goldtree*, 117 Cal. 547.) And either party was entitled to a judgment if a balance was ultimately found in his favor, although the party entitled was a defendant who had not filed a cross-bill. (1 Story's Equity Jurisprudence, sec. 522; Beach's Equity Practice sec. 429; Story's Equity Pleading, sec. 106; Parsons on Partnership, sec. 208.)

These methods of procedure in probate and in equity were obviously not adopted arbitrarily, but from the necessities of the case, and because there could be no complete accounting without establishing the right of the parties entitled to the property accounted for when it was passed from the control of the trustee. And it is difficult to perceive how any good end could be accomplished by arresting a proceeding of this character midway and relegating the parties to another action in the same court, or another court of concurrent jurisdiction, for a second determination of questions which the court in the proceeding had been compelled to determine; an action in which no new questions could well arise, and the only effect of which would be further delay and uncertainty, and possibly further complications arising from conflicting decisions in the different courts.

We conclude, therefore, that in a proceeding of this character the court has the power, and it is its duty whenever the power is invoked, to ascertain who is entitled to the trust estate already delivered by the trustee, and also that which yet remains to be delivered, and make such orders as may be necessary to enable the trustee to make final settlement with the beneficiary in safety and secure a final settlement of his account which will entitle him to a discharge.

It is further provided in section 1699 of the Code of Civil Procedure that the report accompanying the account must give the names and post-office addresses, if known, of the *cestuis que trust*. This the report in question failed to give,

and it is claimed that for that reason the proceeding is void, and that prohibition will lie to prevent further action therein. This, however, would not be sufficient cause for a writ of prohibition. An appeal lies from any order that may be made in the proceeding and it will furnish a sufficient remedy to any person aggrieved by the action of the court in attempting to proceed without jurisdiction.

It is further urged that the court will be premature in its action if it should proceed at the present time to direct the delivery of the property to Gopcevic, the husband, claiming under the will of the deceased daughter. It is claimed that, as less than a year has elapsed since that will was probated, it is still subject to contest, and that therefore the probate is not final, and the property should not be turned over to the appointee until the time for contest has expired, or, if a contest is instituted, until it is finally decided. It is not necessary here to determine whether this contingency would be sufficient to abate the proceeding as for a final settlement, or would be good cause for a postponement of the settlement of the trust until after the probate of the will had become final. We cannot anticipate the action of the court below and assume that it would be erroneous on this point, and in any case its decision would be subject to appeal and an ample remedy is thereby provided.

The application for writ of prohibition is denied.

McFarland, J., Van Dyke, J., and Henshaw, J., concurred.

Beatty, C. J., and Angellotti, J., dissented.

[S. F. No. 2674. In Bank.—November 12, 1904.]

**PACIFIC VINEGAR AND PICKLE WORKS, Appellant,
v. SIDNEY M. SMITH, Respondent.**

**SIDNEY M. SMITH, Respondent, v. PACIFIC VINEGAR
AND PICKLE WORKS, Appellant.**

CORPORATIONS—ILLEGAL CONTRACTS BY PRESIDENT WITH HIMSELF INDIVIDUALLY—TRUST RELATION—UNTENABLE ACTION TO ENFORCE INDORSED NOTES.—One who is president and director of a corporation occupies a fiduciary and trust relation thereto; and where he purchased its notes outright, and caused the corporation, by himself as president, to become an indorser thereof to himself individually, guaranteeing the payment of the notes without the authority, knowledge, or approval of the corporation, he cannot maintain an action to enforce the express contracts of indorsement, the making and enforcement of which are equally prohibited by law.

ID.—BREACH OF TRUST—FAIRNESS AND ADVANTAGE TO CORPORATION NOT CONSIDERED.—Such contracts are a breach of trust, and voidable at the mere election of the corporation, if not absolutely void. In an action to enforce them the court will not permit any investigation as to the honesty or fairness of the contracts, nor permit the trustee to show that they were not detrimental, or that they were advantageous to the corporation.

ID.—FINDING AGAINST EVIDENCE—EXPRESS RATIFICATION NOT SHOWN—WANT OF KNOWLEDGE OF FACTS.—A finding that there was a ratification and approval of the contracts of indorsement of the notes by the corporation is not sustained in so far as it involves an express ratification, where the evidence fails to show that the corporation was in possession of all the facts and acted after knowledge thereof.

ID.—IMPLIED RATIFICATION NOT SHOWN—CONCEALMENT OF FACTS.—A ratification implied from acquiescence and acceptance of benefits is not shown, notwithstanding the secretary of the corporation joined with the president in making the contracts, where the evidence shows that all of the facts were concealed from the directors by both of them, and that, without the knowledge of the directors, the corporate name was affixed to renewal notes, and the liability continued, the existence of which they did not know.

ID.—CONCEALED KNOWLEDGE OF SECRETARY NOT IMPUTABLE TO CORPORATION.—Although it was the duty of the secretary, as well as that of the president, to inform the directors as to the facts, yet where the secretary combined with the president to conceal the facts, and falsely represented them to the directors, the president cannot invoke the doctrine that the knowledge of the secretary is conclusively imputable to the corporation, in support of an implied ratification.

APPEALS from judgments of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinions of the court.

J. C. Campbell, W. H. Metson, Campbell, Metson & Campbell, and John Garber, for Appellant.

The contracts involved a breach of trust, and were illegal and not enforceable. (Morawetz on Private Corporations, sec. 517; *West St. Louis Bank v. Bank*, 95 U. S. 557; *Chamberlain v. Pacific etc. Co.*, 54 Cal. 103; *Graves v. Mining Co.*, 81 Cal. 303; Civ. Code, sec. 2230; *Wickersham v. Crittenden*, 93 Cal. 17, 29; *San Francisco Water Co. v. Pattee*, 86 Cal. 623, 629; *Wright v. Oroville etc. Mining Co.*, 40 Cal. 20, 27; *Davis v. Rock Creek etc. Mining Co.*, 55 Cal. 359;¹ *Wilbur v. Lynde*, 49 Cal. 290;² *Capital Gas Co. v. Young*, 109 Cal. 140; *San Diego v. San Diego etc. R. R. Co.*, 44 Cal. 106; *Shakespeare v. Smith*, 77 Cal. 638;³ *Finch v. Riverside etc. R. R. Co.*, 87 Cal. 597.) There was no sufficient evidence of ratification to bind the corporation by acts and facts not known to, but concealed from, the directors. (*Blood v. La Serena etc. Co.*, 113 Cal. 221; *Murray v. Nelson Lumber Co.*, 143 Mass. 250; *Bispool Sewing Machine Co. v. Acme Co.*, 153 Mass. 404; *Edwards v. Carson Water Co.*, 21 Nev. 469; *Elwell v. Puget Sound Lumber Co.*, 7 Wash. 487; *Yellow Jacket M. Co. v. Stevenson*, 5 Nev. 224.)

Carter P. Pomeroy, for Respondent.

The contracts were not void. They were in effect a loan of money by its president to the Pickle Works, and are enforceable. (*Mullanphy Savings Bank v. Schott*, 135 Ill. 655;⁴ *Beach v. Miller*, 130 Ill. 162;⁵ *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Holt v. Burnett*, 146 Mass. 137; *Sutter-Street R. R. Co. v. Baum*, 66 Cal. 44; Taylor on Corporations, par. 634; *Santa Cruz R. R. Co. v. Spreckles*, 65 Cal. 193; *Seeley v. San Jose etc. Co.*, 59 Cal. 22; *Bonney v. Tilley*, 109 Cal. 436, *Garrett v. Burlington Plow Co.*, 70 Iowa, 700;⁶ *Borland v. Haven*, 37 Fed. 400; *Campbell's Case*, L. R. 4 Ch. Div.

¹ 36 Am. Rep. 40.

² 19 Am. Rep. 645.

³ 11 Am. St. Rep. 327.

⁴ 25 Am. St. Rep. 401.

⁵ 17 Am. St. Rep. 291, and note.

⁶ 59 Am. Rep. 461, and note.

470; *Sanford Fork etc. Co. v. Howe, Brown & Co.*, 157 U. S. 312; *Roseboom v. Whittaker*, 132 Ill. 81; *Merrick v. Peru Coal Co.*, 61 Ill. 472; *Harts v. Brown*, 77 Ill. 226.) The president had a right to purchase assets of the corporation for full value, and enforce the same at least to the extent of his money and legal interest. (Taylor on Corporations, par. 627, and note; *Bonney v. Tilley*, 109 Cal. 346; *Sullivan v. Triumfo Mining Co.*, 39 Cal. 459; *Santa Cruz R. R. Co. v. Spreckles*, 65 Cal. 193; *Seeley v. San Jose etc. Co.*, 59 Cal. 24; *Phillips v. Sanger Lumber Co.*, 130 Cal. 459; *Borland v. Haven*, 37 Fed. 406; *Kitchen v. St. Louis etc. Ry. Co.*, 69 Mo. 224; *Pacific R. R. Co. v. Ketchum*, 101 U. S. 289; *Ryan v. Williams*, 100 Fed. 172; 3 Thompson on Corporations, par. 4070; *Campbell's Case*, L. R. 4 Ch. D. 470.) The corporation could not cancel its indorsement without doing equity and restoring the money paid. (Taylor on Corporations, par. 631; *Great Luxembourg Ry. v. Magnay*, 25 Beav. 386; *Duncomb v. New York etc. R. R. Co.*, 88 N. Y. 190; *Harpending v. Munson*, 91 N. Y. 650; *Fudihar v. East Riverside Irr. Dist.*, 109 Cal. 312; *Underhill v. Santa Barbara etc. Co.*, 93 Cal. 312; Civ. Code, sec. 1689.)

The finding of ratification must be sustained, though this court might come to a different conclusion of fact from the trial court. (*McMullin v. McMullin*, 140 Cal. 115.) Ignorance of facts cannot avail where the facts are such as reasonably to put on inquiry. (*Ballard v. Nye*, 138 Cal. 598; *Mechem on Agency*, sec. 148.) The case shows an implied ratification. (Taylor on Private Corporations, secs. 214, 216, and cases cited; 4 Thompson on Corporations, secs. 5196, 5286, and cases cited.) The secretary and general manager, Mr. King, had authority to bind the corporation by his indorsement of commercial paper. (*McKiernan v. Lensen*, 56 Cal. 61.)

HENSHAW, J.—From the decision of this court in Bank, rendered in the above-entitled cause February 11, 1904, and hereafter set forth, a rehearing was granted, to the end that a finding made by the trial court, to the effect that the Pacific Vinegar and Pickle Works ratified and approved each and every indorsement placed upon the notes of the California Packing Company by Smith as president and King as secretary, should receive further consideration. It was urged in

the petition for rehearing that although the principle of ratification was fully recognized in the opinion, through some oversight the finding declaring a ratification, which finding fully supported the judgment of the trial court, had been overlooked.

Our attention, therefore, upon this hearing is limited to the single question whether or not the finding of ratification is supported by the evidence. Respondent contends that the finding is supported, first, under evidence showing express ratification, and, second, under evidence showing implied ratification.

1. The express ratification, it is contended, finds support in the evidence of Mr. Koster, the vice-president of the Pickle Works, who, during a three months' absence of the president, Mr. Smith, performed the latter's duties. During Koster's incumbency as president he indorsed three of the California Packing Company's notes. Respondent in his brief asserts that "Mr. Koster himself testifies that at the time he made this indorsement he knew that at least one of those notes belonged to Mr. Smith, although he denies any personal knowledge of the fact that he was effecting a renewal." The evidence of Mr. Koster, with the inferences and deductions which may legitimately be drawn from it, is the only evidence touching express ratification. Mr. Koster's testimony, however, is at variance with respondent's statement of it. It is brief, and may be set forth in full: "I never knew until March, 1900, that Mr. Smith had assigned or indorsed any of those notes to himself. I never knew that there was any notes of the California Packing Company in existence outside of those which we held in the safe amounting to \$12,000 or \$15,000. By reason of what had been told me at the directors' meetings I believed it was all paid up. I acted as vice-president of the company during Mr. Smith's absence. During that time I indorsed three notes, one of which may have belonged to Mr. Smith, but I did not know that any of them were renewal notes. I never knew anything about renewals. I was told that some money was needed from the bank and I indorsed some California Packing Company paper which the Pacific Vinegar and Pickle Works had, for the purpose of getting money to run the business. I knew that the company had paper of the California Packing Company, but did not know

any of it was renewed until after Mr. King's defalcation. I did not see any renewal notes brought to me. If there had been any renewal notes brought to me that would have stopped right there. No notes were brought to me which had already been renewed by the Pacific Vinegar and Pickle Works. In every instance I asked Mr. King if the notes of the California Packing Company were being paid and he told me 'Yes.' " It is to be remembered that the directors, one and all, testified that they had no knowledge of any of these transactions; they knew nothing of the existence of the California Packing Company notes held by Smith upon which their company (the Pickle Works) was liable as indorser, and that at every directors' meeting, in the presence and hearing of Mr. Smith, the president, they asked if the California Packing Company's notes were being paid at maturity, and always received an affirmative answer from the secretary. Bearing in mind that an express ratification can only be found against a party when it is shown that he is in possession of all the facts, and has acted after such knowledge, it is at once apparent without further discussion that the testimony of Mr. Koster falls far short of establishing such a ratification.

2. The doctrine of implied ratification is invoked to support the finding. The doctrine of implied ratification is thus expressed: "An implied ratification may also arise if the corporation accepts the benefit of the unauthorized act, but a corporation will not be held to have ratified an act impliedly by accepting the benefit of it unless knowledge of the act was actually possessed by some corporate agent who had authority to act for the corporation in the matter, or whose function it was to report it to the proper authorities, or unless knowledge of the act would have been possessed by some such agent had there not been neglect of duty on his part, the consequences of which are to be borne by the corporation rather than by the party from whose performance it has been benefited. Consequently, in order to constitute an implied ratification on the part of the corporation, arising from acquiescence, or from accepting the benefit of an act, it may not be necessary that the circumstances should be such as to warrant a jury in finding actual knowledge on the part of the corporation, or corporate agents competent to ratify, for the knowledge of one agent may, at least in the absence of proof to the contrary,

be imputed to other agents who have authority to do the acts in question, or even to the corporation." (Taylor on Private Corporations, 2d ed., secs. 214, 215.)

It is urged that the facts in this case show that the corporation received the benefit of the money paid by its president, Smith, in discounting the notes of the Packing Company, and that as the secretary King joined with Smith in indorsing the name of the Pickle Works upon the notes, and as it was King's duty to inform the corporation of these facts, the negligence upon his part in not doing so is not negligence of which the corporation can avail itself while retaining the proceeds of the notes; and that, therefore, by conclusive implication the corporation had knowledge of the transaction and thus ratified it. The whole structure, it is to be observed, is built upon the somewhat flimsy foundation of a mere disputable presumption—a presumption which, while in strictness evidence, has been characterized as evidence "the weakest and least satisfactory." The case here presented is not at all parallel with those where the directors themselves are in fault for not knowing the things with knowledge of which they are sought to be charged. Here it affirmatively appears that knowledge of these transactions was concealed from the board of directors not by the secretary, King, alone, but by the president of the company, who was drawing a salary for his services, who attended the directors' meetings, and who never, such is the record, informed his board as to any of these matters, but sat silent when his directors asked as to the payment of the notes of the California Packing Company, and when the secretary answered with the false statement that they were being promptly met. It appears, therefore, that the directors did what in reason they might have been expected to do,—made inquiries in open board,—and were deceived, not alone by the answers of the secretary, but by the silence of their president, whose duty, equally with the secretary, it was to tell them the truth. So telling them, the directors would have known that their corporation stood liable upon the paper of the California Packing Company as indorser for thousands of dollars which they knew not of, that their liabilities were to this extent increased, and they would have been in a position to take steps to reduce that liability and enforce the obligations of the California Packing Company. By the method

which Smith adopted, however, they were kept in ignorance of these things, their corporate name was affixed to renewal notes, thus continuing their liability, and not that alone, but continuing a corporate liability which they did not know existed. Under these circumstances it cannot be successfully argued that the president of the corporation is entitled to invoke the doctrine of implied ratification, and thus reap the fruits of his own concealment.

For the foregoing reasons, in addition to those given in the opinion above referred to, which opinion is hereby adopted and affirmed, the judgment appealed from is reversed and the cause remanded.

McFarland, J., Lorigan, J., Van Dyke, J., and Beatty, C. J., concurred.

The following is the opinion above referred to and approved, which was rendered in Bank February 11, 1904:—

LORIGAN, J.—These cases are both presented on a consolidated transcript on appeal, and, as the same general principles of law are applicable to both, they will be considered together.

The first action is brought by the Pacific Vinegar and Pickle Works (which for brevity will hereafter be referred to as the Pickle Works or corporation), to enjoin the said Sidney M. Smith from selling or transferring certain promissory notes not yet due, given by a corporation known as the California Packing Company to said Pickle Works, and indorsed by said Smith as president of the latter to himself, also for the cancellation of such indorsements.

The second action is brought by said Sidney M. Smith against the Pickle Works, to obtain judgment on notes executed by the same Packing Company to the Pickle Works, and similarly indorsed and held by him.

The pleadings in both cases fully raise the legal question to be disposed of, and the facts under which it is presented are as follows:—

Said Sidney M. Smith was at all the times herein mentioned a director and president of the Pickle Works, and the by-laws thereof provided that "he shall sign as president all certificates of stock, checks, notes, bills payable, acceptances,

bills of exchange, contracts, and other instruments in writing, and shall have full power to act in all respects as the general agent and manager of the company, subject to the advice of the board of directors''; that said Pickle Works was doing business with a corporation known as the California Packing Company, under a contract which provided that the Pickle Works should supply the California Packing Company with material, and binding the latter not to contract with any other parties for such material; that the Pickle Works sold goods to the Packing Company under such contract, and, upon monthly statements rendered, notes were given by the latter in favor of the former, indorsed by one A. B. Patrick; that some of said notes so delivered were retained by the Pickle Works, some respondent Smith had discounted by the Bank of British Columbia for the benefit of the Pickle Works, and others were purchased by said Smith, in which latter case, as when discounting them to the bank, he transferred the same by an indorsement of the name of the Pacific Vinegar and Pickle Works thereon, by himself as president; that when he purchased said notes from the Pickle Works he paid over for its benefit the face of the principal and accrued interest thereon, and that no better terms could have been obtained at a bank.

On December 13, 1899, said Smith held notes of said Packing Company so indorsed, and maturing on that date, amounting to the sum of \$16,992.28, which on that day he surrendered, and took from said Packing Company a series of notes, each for about fifteen hundred dollars, maturing monthly. These renewal notes were also indorsed by A. B. Patrick, and when delivered to said Smith by the Packing Company he indorsed them to himself as before, with the name of the Pacific Vinegar and Pickle Works, by himself as president; that said renewal notes were so taken at the request of the Packing Company, and were drawn in such series of small amounts so that said company could meet them monthly, and were renewed so that the time of payment might be extended.

Aside from the renewal notes, Smith held other notes of the Packing Company, purchased by him from the Pickle Works, and similarly indorsed. Of these, three, for upwards of fifteen hundred dollars each, were paid by the Packing

Company to respondent Smith in September, October, and December, 1899, and of the renewal notes of December 16, 1899, three for fifteen hundred dollars each were likewise paid him in January, February, and March, 1900. No payments were made during these periods of any of the notes executed by the Packing Company to the Pickle Works and retained by it, although at these times the secretary of the latter had in its safe unpaid notes of said Packing Company, which in March, 1900, amounted to from twelve to fifteen thousand dollars, besides which there were outstanding, on that date, notes of said company, indorsed by the Pickle Works, by said Smith as president, and held by the Bank of British Columbia, amounting to about twenty thousand dollars. That none of the other four members of the board of directors of the Pickle Works had any knowledge of these transactions. It further appears that the Pickle Works is solvent. As to the actual condition, in that respect, of the Packing Company, or A. B. Patrick, the prior indorser of its paper, the record is silent, although it appears from the evidence that the Packing Company had stated to Smith that it could not pay its bills monthly and pay the full amount of the notes, and it was for that reason that he had put them in such a shape as to mature in the neighborhood of fifteen hundred dollars per month. These are some of the principal facts in the case, and are all that are necessary here to be stated in order to fully present and consider the main proposition of law involved.

Judgments were rendered in favor of Sidney M. Smith in both actions: in the first, for his costs; in the second, for the amount of the notes therein sued on (\$7,654.96); and from both judgments the Pickle Works appeals.

Several points are made by appellant for a reversal, but we will consider only the main one, which we deem controlling and decisive of the case. The others are merely subsidiary and unimportant.

Broadly stated, the legal proposition insisted on by appellant is, that one occupying a fiduciary or trust relation to a corporation cannot, while such relation exists, enter into any express contract with himself individually relative to the trust property which will be binding on the corporation; that such a contract is a breach of trust, and voidable at

the mere election of the corporation, if not absolutely void; and that when such a contract is sought to be enforced, the court will not permit any investigation as to the fairness or unfairness of the transaction, nor will it permit the trustee to show that it was not detrimental, or that it was even advantageous to the beneficiary. Such an inquiry cannot be entered into.

And specially applying the rule to the facts in the case at bar, it is claimed that as the respondent Smith, at the time he acquired ownership of said notes, occupied a fiduciary and trust relation to appellant corporation, both as president and director, and that as the contract of indorsement guaranteeing the payment of said notes by said corporation were made by himself as president to himself individually, without the authority, knowledge, or approval of the corporation, they cannot be enforced by him against it. We are satisfied that this contention of appellant is sound and sustained, not only by the code provisions of this state, but by an unbroken line of authorities.

It will be observed that no question is involved in this action of the right of a director who has advanced or loaned money to a corporation, to recover it back on a *quantum meruit*, and decisions which sustain such a right have no application. The action at bar is one brought by a director who, as president of the corporation, purchased its notes outright, and caused the corporation, by himself as president, to become indorser of the notes to himself, individually, as indorsee, and is now seeking to enforce such contract of indorsement against his corporation.

His suit is brought upon an express contract, the making of which and its enforcement are equally prohibited by law.

In this regard the general principle is clearly stated in *Bensiek v. Thomas*, 66 Fed. 104: "It is an elementary law that an agent authorized to act for a principal in a given negotiation cannot deal with himself. He cannot, when authorized to buy property or borrow money, sell his own property or loan his own funds without communicating the fact to his principal. An agent cannot unite his personal and representative characters in the same transaction. The doctrine applies to all persons who occupy a fiduciary relation, and it is especially applicable to the officers of a corporation,

when acting for and in behalf of the company. They cannot use their official position to benefit themselves individually. In short, an officer of a corporation is not qualified to act for his company in any transaction wherein the corporation is dealing with the officer." (*Wardell v. Railroad Co.*, 103 U. S. 651; *Mallory v. Mallory Wheeler Co.*, 61 Conn. 131; Bigelow on Fraud, 217; Perry on Trusts, sec. 207.) And in Morawetz on Private Corporations (sec. 517) it is said: "The directors of a corporation have no authority to bind the company to any contract made with themselves personally. . . . Thus a president, cashier, or managing agent, having authority to sign the name of a corporation to negotiable instruments, cannot execute or indorse a note to himself or certify a check for his own benefit."

This rule is based on sound public policy, and there also enters into it the legal principle that, in order to make an express contract, there must be the assent of two separate independent minds; that no man can effectually make a contract with himself.

In the case at bar, the respondent Smith assumed to constitute himself both the contracting parties. There is no pretense that he was dealing with the corporation represented by other members of the board of directors or with other agents thereof. He was dealing with himself,—contracting as president with himself as an individual, and was the contracting party on both sides. The corporation made no sale of these notes to or contract of indorsement thereof with him. He adjusted the whole matter, dictated the terms of the transfer by himself with himself, completed the transaction in this unilateral capacity, and it was the result solely of his own discretion and volition. To this situation the language of the court in *Mercantile Mutual Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 410, may pertinently be applied: "A contrivance which reduces the two parties to one, and admits an agent representing antagonistic interests to make a bargain by himself, is so far against the policy of the law that the contract is held to be void, unless the principal chooses afterwards and with knowledge of all the circumstances that affect his possession, to ratify the act of his agent."

In Clark & Marshall's Private Corporations (vol. 3, sec. 759) the rule is concisely summed up in this language: "A

person cannot as director, or other officer of a corporation, enter into a valid contract on behalf of the corporation with himself in his individual capacity, or be both vendor and purchaser, for two persons are necessary elements to the formation of a contract. The fact that he acts as an officer of the corporation on one side and for himself on the other can make no difference."

Recurring now to the main legal proposition under discussion, it is provided by section 2230 of the Civil Code that "Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except . . . when the beneficiary, having capacity to contract, with the full knowledge of the motive of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so."

And by section 2234 of the same code it is provided that "Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust."

These code provisions apply to directors of a corporation in their relation to it as trustee, and by section 2322 of that code they are made to apply to the respondent, as the agent of such corporation, in the case at bar.

This last section declares that "An authority [of an agent] expressed in general terms, however broad, does not authorize an agent: . . . 3. To do any act which a trustee is forbidden to do by article II, chapter I, of the last title," which chapter includes the sections above quoted.

As it does not appear in this case that the respondent had any special authority from the corporation to enter into the transaction in question here, he necessarily must claim to have been empowered to make it under an authority expressed in general terms, and hence the sections (Civ. Code, 2230, 2234) in regard to trustees must apply to him as a mere agent of the corporation.

So applied, the law is inflexible, that one acting in such fiduciary capacity will not be permitted to deal with himself in his individual capacity relative to the trust property.

Upon this point, as we have said, the current of authority

in this state is unbroken, and it will only be necessary to refer at length to a few of the cases which clearly and uncompromisingly announce the rule, with general citations to such others from our own court as affirm the doctrine.

In the case of *Davis v. Rock Creek etc. Co.*, 55 Cal. 364,¹ where the facts are stated as well as the law declared, it is said: "But apart from this consideration, the transaction in question cannot be upheld. The law, for wise reasons, will not permit one who acts in a fiduciary capacity thus to deal with himself in his individual capacity. The position of A. Wolff, as a member of the firm of A. Wolff & Co., and his position as trustee and president of the corporation defendant, were inconsistent and conflicting. In purchasing the debts of the corporation in his individual capacity, it was to his interest to buy them at as great a discount as possible. The greater the discount the greater his gain. If he succeeded in purchasing the debts at *any* discount, to that extent he assumed to himself an advantage not common to all of the stockholders. To permit this to be done would be to permit the violation of one of the plainest principles of equity applicable to trustees. In this particular case it does not appear that Wolff assumed the demands against the corporation at any discount, neither does it appear that he did not. Nor does the policy of the law permit an inquiry into that question. Occupying, as he did, the position of trustee he should not have put himself in a position adverse to his *cestui que trust*. One cannot faithfully serve two masters whose interests are diverse."

In the still later case of *Sims v. Petaluma Gaslight Co.*, 131 Cal. 659, it is said: "The court was clearly correct in holding that for the reasons stated, the contract introduced in evidence on the part of the plaintiff was invalid. Being president of the defendant corporation, Van Syckel necessarily was one of the directors thereof (Civ. Code, sec. 308); and as such he occupied a fiduciary relation to the corporation and its stockholders. 'A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner.' (Civ. Code, sec. 2229.) He cannot take part in any transaction in which he, or any one for whom he acts, has an interest, present or

¹ 36 Am. Rep. 40.

contingent, adverse to that of his fiduciary. (Civ. Code, sec. 2230.) In fact, this rule did not have its origin with the codes but it is much older. It is against public policy to permit any person occupying fiduciary relations to be placed in such a position that he may be tempted to betray his duty as a trustee. 'Hence the rule is unyielding that a trustee shall not, under any circumstances, be allowed to have any dealings with the trust property, with himself, or acquire any interest therein. Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary.' (*Wickersham v. Crittenden*, 93 Cal. 29.) In *Aberdeen Ry. Co. v. Blakie*, 1 Macq. H. L. 461, it is said: 'So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of the contract so entered into. It obviously is, or may be, impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the interests of the *cestui que trust* which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal, with the estate or interests of those for whom he is a trustee have been as good as could be obtained from any other person; they may even at the time have been better, but still, so inflexible is the rule, that no inquiry on that subject is permitted.' "

These authorities lay down two propositions: 1. That an expressed contract cannot be entered into by a director with himself relative to the trust property; and 2. That the court will not permit any inquiry into the question of the honesty or fairness of the transaction.

The philosophy of this rule is quite apparent, and its inflexibility is the strongest safeguard which the law can offer for the protection of the interests of the beneficiary. The great purpose of the law is to secure fidelity in the agent. When one undertakes to deal with himself in different capacities—individual and representative—there is a manifest hostility in the position he occupies. His duty calls upon him to act for the best interests of his principal; his self-interest prompts him to make the best bargain for himself. Humanity is so constituted that when these conflicting interests arise the temptation is usually too great to be overcome; and duty

is sacrificed to interest. In order that this temptation may be avoided, or, if indulged in, must be at the peril of the trustee, it has been wisely provided that the trustee shall not be permitted to make or enforce any contract arising between himself as trustee and individually with reference to any matter of the trust, nor will the court enter into any examination of the honesty of the transaction.

As said by the supreme court of New York in *Munson v. Syracuse etc. R. R. Co.*, 103 N. Y. 74: "The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them, as far as may be, impossible, knowing that real motives often elude the most searching inquiry, and it leaves neither to judge or jury the right to determine upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall. . . . The value of the rule of equity to which we have adverted lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of trustees, by vitiating, without attempted discrimination, all transactions in which they assume the dual character of principal and representative."

So harmonious is the law on this subject that authorities might be cited indefinitely, but reference is made only to those in this state where the principles have been discussed, reiterated, and approved. (*San Diego v. San Diego etc. R. R. Co.*, 44 Cal. 112; *Andrews v. Pratt*, 44 Cal. 317; *Wilbur v. Lynde*, 49 Cal. 292;¹ *Chamberlain v. Pacific Wool-Growers Co.*, 54 Cal. 106; *Shakespear v. Smith*, 77 Cal. 638;² *Smith v. Los Angeles Immigration Assn.*, 78 Cal. 292;³ *Graves v. Mono etc. Mining Co.*, 81 Cal. 319; *San Francisco Water Co v. Patee*, 86 Cal. 629; *Wickersham v. Crittenden*, 93 Cal. 31;

¹ 19 Am. Rep. 645.

² 12 Am. St. Rep. 53.

³ 11 Am. St. Rep. 327.

Capital Gas Co. v. Young, 109 Cal. 143; *Curtin v. Salmon River etc. Co.*, 130 Cal. 345.¹)

We have examined the cases cited by counsel for respondent to support the validity of this contract and the right of respondent to recover upon it, but they have no relevancy to the real point involved. We will not discuss at all the authorities cited from other jurisdictions, and as to the cases in this state will mention them briefly, and then only to point out their special inapplicability.

All the cases cited by counsel are cases where either the director of the corporation whose dealings were questioned dealt directly, but illegally, with the board of directors of a solvent corporation, assuming to act for it, or dealt with such board with the knowledge or approval of the stockholders, or they are cases where the illegal action of the director was subsequently ratified and approved by the corporate authorities. In none of these cases is it held that he could deal with himself, or that a contract made with himself without the knowledge of the other directors or the stockholders, or without the subsequent ratification or approval of the corporation, could be sustained or enforced against the corporation.

This marked distinction is plainly declared in a line from one of the cases cited by respondent (*Twin Lick Oil Co. v. Marbury*, 91 U. S. 590), where the court says: "The defendant was not here both seller and buyer."

In the case at bar he was both seller and buyer, with the additional relation created by himself, with himself, of indorser and indorsee.

Referring now briefly to the authorities cited by respondent from this court:

In the case of *Santa Cruz R. R. Co. v. Spreckles*, 65 Cal. 193, no question of a director dealing with himself was involved. The plain point decided there was, that the corporation having borrowed money from the director Hihn, the latter was entitled to be repaid. But this is practically declared to be the rule in *Davis v. Rock Creek etc. Mining Co.*, 55 Cal. 359;² *Graves v. Mono etc. Mining Co.*, 81 Cal. 319; and *Sims v. Petaluma Gas Co.*, 131 Cal. 659; that where the corporation has dealt with the director he can recover upon a

¹ 80 Am. St. Rep. 132.

² 36 Am. Rep. 40.

quantum meruit. Not, however, that a director can recover upon an express contract made with himself without the knowledge or sanction of the corporation.

In the case of *Sutter-Street Ry. Co. v. Baum*, 66 Cal. 44, and *Bonney v. Tilley*, 109 Cal. 346, the note and mortgage involved there were given by the corporation to a director. In *Seeley v. San Jose etc. Co.*, 59 Cal. 25, the plaintiff paid off a note of the corporation at the request of its president and superintendent, and thereupon the corporation gave a note to plaintiff to secure repayment. At an annual meeting of the board of directors and stockholders this note was recognized, sanctioned, and approved by them. There was nothing in the case calling for the application of the rule declared in *Davis v. Rock Creek etc. Co.*, 55 Cal. 364,¹ or cases affirming a similar principle. In fact, the court in *Seeley v. San Jose etc. Co.*, 59 Cal. 25, recognized the distinction, and particularly stated in its opinion that the case then in hand was not "at all like unto *Davis v. Rock Creek etc. Co.*, 55 Cal. 364;¹ or like the cases of *San Diego v. San Diego etc. R. R. Co.*, 44 Cal. 112, and *Wilbur v. Lynde*," 49 Cal. 292,² previously referred to by us in this opinion.

Neither is *Phillips v. Sanger Lumber Co.*, 130 Cal. 431, applicable. The only point decided there was that the corporation had ratified the contract claimed to be illegal, and was bound by the ratification. These are all the cases from this court cited by counsel, and none of them run counter to, but clearly recognize the distinction between, cases where the director deals with the corporation, or his act, while illegal, is subsequently ratified by it, and cases where he deals with himself without the knowledge and approval of the corporation and where there is no ratification.

While some claim is made that the corporation in this case ratified the respondent's acts, it is only a claim; there is not only no evidence to support it, but the evidence is, that none of the other officers of the corporation were informed by respondent of the matter, or knew of the transaction.

It is hardly necessary to say that the general power conferred upon Smith under the by-laws did not give him authority to contract with himself. In every case where the validity of a contract made by a trustee with himself is in question,

¹ 36 Am. Rep. 40.

² 19 Am. Rep. 645.

general authority to act for the corporation must necessarily have existed in order to apply the principle invoked here. The law assumes that the trustee is invested with general power to contract, but limits its exercise to matters strictly in the interest of the beneficiary, and disqualifies him from exercising it in his own behalf. This disability directly results from the existence of the general authority.

In disposing of this matter it may be said that if a director wishes to take security for advances made to the corporation it is not requiring too much of him to ask for such security, or for whatever contract he would equitably be entitled to, in order to protect his advances.

If he fails to do so, and has any equitable claim arising from such advances against the corporation, he may bring an action on a *quantum meruit* to recover.

He cannot, however, make an express contract with himself which can be enforced against the corporation against its will; nor can the fairness of such a contract be inquired into or affect the rule.

The principles here announced apply to both cases considered on this appeal, and for the reasons given the judgments therein appealed from are reversed and the causes remanded.

Beatty, C. J., and Henshaw, J., concurred.

McFARLAND, J., concurring.—I concur in the judgment of reversal, and in nearly all that is said in the opinion of Mr. Justice Lorigan; but I think that some of the quotations to be found in the opinion state that principle of law under discussion rather too broadly. It may be well to say, also, that it is quite likely that the respondent Smith did not intend to do any unlawful act, and that what he did probably inured to the benefit rather than the injury of the Pickle Works; but well established and just general principles of law can occasionally be invoked so as to work hardship in particular cases.

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[Sas. No. 1230. Department Two.—November 14, 1904.]

**JOHANNE GATJE, Respondent, v. E. M. ARMSTRONG,
Appellant.**

ACTION TO SET ASIDE DEED—FRAUD AND UNDUE INFLUENCE—CONFIDENTIAL RELATIONS—APPEAL—SUPPORT OF FINDINGS—PRESUMPTION.—

In an action to set aside a conveyance for alleged fraud and undue influence exercised by the defendant over the plaintiff, in violation of a confidential relation between them, where the judgment is for the plaintiff, it must be presumed upon appeal, in support of the findings of the court, that the court gave full credit to the testimony of the plaintiff, and refused to believe the evidence adduced by the defendant in conflict therewith.

ID.—INADEQUACY OF CONSIDERATION—TAKING ADVANTAGE OF IGNORANCE AND CONFIDENCE.—Where the defendant took advantage of the highest trust and confidence reposed in him by the plaintiff, and of the ignorance of the plaintiff, to obtain a deed from her to him for a grossly inadequate consideration, a court of equity is warranted in finding that the deed was obtained by fraud, and that the same should be canceled.

ID.—EQUITY—ADJUSTMENT OF ACCOUNTS.—The defendant having obtained the conveyance by fraud, equity invests him with the character of a trustee for plaintiff, and a court of equity will do complete justice between the parties, and to this end will adjust the accounts between them in relation to the land, and will offset the claim of one against the other, and will not require the plaintiff to restore to defendant money received, where it is shown that the latter has already realized out of the trust estate more than the amount paid by him to the plaintiff in the original transaction.

ID.—UNNECESSARY TENDER BY PLAINTIFF—RELIEF UNDER GENERAL PRAYER.—The fact that the plaintiff at one time tendered to defendant what he was not entitled to receive is immaterial; and under the prayer for general relief the court can give such relief as plaintiff was entitled to.

ID.—FRAUD UPON DIVORCED HUSBAND—ESTOPPEL OF DEFENDANT.—The defendant will not be permitted to validate his own fraudulent act by showing that the plaintiff, whom he has defrauded, intended by the conveyance to defraud her divorced husband.

APPEAL from an order of the Superior Court of Glenn County denying a new trial. Oval Pirkey, Judge.

The facts are stated in the opinion.

E. A. Bridgford, and William M. Finch, for Appellant.

Frank Freeman, and Charles L. Donohoe, for Respondent.

GRAY, C.—This is an action to set aside a conveyance of upwards of three hundred acres of land in Glenn County, alleged to have been procured by defendant from plaintiff by means of fraud and undue influence exercised by the latter toward the former, and to compel defendant to reconvey said lands to plaintiff. The case was tried without a jury, findings were waived, and judgment was entered in plaintiff's favor. The appeal is by defendant from an order denying him a new trial.

The main contention of appellant is to the effect that the decision of the court is unsupported by the evidence, and there being no findings in the case, appellant endeavors to show that upon no reasonable theory of the evidence can the judgment of the court find support.

In support of the judgment it is proper to presume that the trial court gave full credit to the testimony of the plaintiff in the case and refused to believe the evidence adduced by defendant wherein it conflicted with plaintiff's evidence.

Plaintiff's story as told upon the witness-stand was, in substance, that she was a German woman little versed in the English language, with very little knowledge of business, and no knowledge of law. That a short time before meeting the defendant she had been divorced from her husband. That the real property in dispute here had belonged in part to her divorced husband and in part to herself, the whole having a mortgage on it for about three thousand dollars. That the husband had conveyed his part of the property to plaintiff that she might dispose of it the more conveniently by sale or otherwise and thereafter restore to him in money the equivalent of his interest in the aggregate property. The plaintiff was sent by an employment agency in San Francisco, at the request of defendant, to see the defendant, on Taylor Street in said city, where defendant seems to have been waiting in bed to undergo some kind of a surgical operation. The plaintiff waited on defendant for a few days subsequent to the operation, for which the defendant paid her. He also engaged her to go with him to Iowa Hill, in Placer County, there to cook for him and his men for wages at a certain mine which defendant was managing. Soon after going there, and after mutual protestations of love between the pair, plaintiff

and defendant became engaged to be married, and also thereafter became intimate sexually. This relation existing between them, and he being a shrewd business man, the plaintiff soon came to rely on defendant for advice and aid in conducting her business in connection with her land in Glenn County. The defendant undertook to procure a loan for plaintiff to take up the three-thousand-dollar mortgage when the same should fall due, but failed to obtain the same. While her affairs were in this condition, defendant came to plaintiff, with a paper in his hand, and informed her that her divorced husband was threatening a suit to get his property back from her. Defendant advised plaintiff that she would lose her property if she did not follow his directions. The plaintiff acted upon this advice, and in obedience to defendant's directions conveyed the property to defendant, receiving therefor his note for five hundred dollars, together with a check for five hundred dollars more. She testifies, in substance, that this was a mere colorable transaction, that defendant agreed that plaintiff "could have her property back for the same amount of money." She says, "He told me you can take this five-hundred dollar check and you can buy your children some clothes and send for your children." That thereafter she offered him the said note and check and demanded her property back; that he then informed her that it was not time yet to reconvey, for the reason that her husband had sued her "down in the city." She says: "When I told him to give me my property back, he said it isn't time to do it now. your home is with me, you go to Iowa Hill, that is the place where you have to stay." Thereafter she returned to Iowa Hill. Some months later defendant repudiated his agreement to marry the plaintiff, refused to return her property to her, and told her "to get out," claiming that he had bought the property and that it was his own.

It further appears from the evidence that the property in dispute is of the value of about ten thousand dollars.

We think that the foregoing evidence warrants a court of equity in finding that the deed from the plaintiff to defendant was obtained by fraud, and that the same should be canceled.

Conceding that there was no false representation as to a suit having been threatened by plaintiff's divorced husband,

the relations of the parties were of such a character that it was natural for plaintiff to repose, as she did, the highest trust and confidence in defendant. The defendant took advantage of this confidence and of the ignorance of plaintiff to obtain a deed to this property for about half what it was worth. The gross inadequacy of the consideration, combined with the condition of dependence, trust, and confidence of the plaintiff in the defendant, we deem entirely sufficient to predicate the decree of fraud upon.

The decree requires the plaintiff to cancel and surrender to defendant the five-hundred-dollar note, which she received from him, but does not require the restoration of the five hundred dollars received in the check, or any other sum of money paid out by defendant on account of this land. In this, however, we see no error. It is true defendant paid off the mortgage on the property amounting to \$3,304. He also re-mortgaged it for fifteen hundred dollars, which amount at least seems still to be a lien on the property. In addition to this the defendant received rents from the property, as conceded in his reply brief, to the extent of \$1,588.55. It also appears that defendant sold some forty-five acres of the place. It is fair to presume that the trial court sitting as a court of equity, to determine what the decree should be, charged the defendant with the full value of this land at thirty dollars per acre, as shown by the testimony of the witnesses, which would amount to \$1,350 for the forty-five acres. If we add the amount of the outstanding mortgage of fifteen hundred dollars to the total of the value of the forty-five acres sold and the amounts received in rents, the sum is about \$4,438. Deduct from this the total of \$3,304 paid on the mortgage and the five hundred dollars given to plaintiff at the execution of the deed, and we have left \$634. Of course, nothing should be allowed for the item of \$1,260 paid by defendant for a strip of land adjoining the land in controversy. This strip is no portion of the land here in controversy, and has nothing to do with the case in hand. The court was also warranted in refusing to allow defendant anything for his personal services or expenses in connection with the land, for the reason that there is evidence tending to show that those services and expenses were voluntary acts of kindness which plaintiff was led to believe were to be performed without compensation. There

are some items of expenditure upon the property, such as insurance, taxes, abstracts, repairs, etc., amounting in the aggregate to less than five hundred dollars, which the court may have offset against the balance of \$634 mentioned above; and if they were so offset the appellant can find no ground of complaint therein. The defendant having obtained the conveyance by fraud, equity invests him with the character of a trustee, and he holds the property in trust for plaintiff, and a court of equity will do complete justice between the parties, and to this end will adjust the account between them in relation to the land and will offset the claim of one against the other, and will not require the plaintiff to restore to defendant money received when it is shown that the latter has already realized out of the trust estate more than the amount paid by him to the plaintiff in the original transaction. The valid claim for money by the one will be treated as extinguishing, so far as it will go, a similar claim by the other, leaving nothing to be returned or restored where the claim is thus fully extinguished. (*More v. More*, 133 Cal. 489.)

Nor is it material that plaintiff on one occasion tendered to defendant the five-hundred-dollar check and in her complaint offers to restore the five hundred dollars represented by the check. From the evidence the court was warranted in finding that this offer was more than the defendant was entitled to receive, and under the general prayer for relief can give to plaintiff such decree as she was entitled to.

The contention of appellant that plaintiff should be refused relief because the purpose of the conveyance was to defraud her divorced husband is disposed of by the recent well-considered case of *Donnelly v. Rees*, 141 Cal. 56. The defendant will not be permitted to validate his own fraudulent act by showing that the party he has defrauded intended to defraud some other person.

Some alleged errors of law occurring at the trial are referred to by appellant. We have examined these and find that they are not of sufficient importance to warrant a discussion.

We advise that the order denying a new trial be affirmed.

Cooper, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the order denying a new trial is affirmed.

McFarland, J., Lorigan, J., Henshaw, J.

Hearing in Bank denied.

[S. F. No. 2890. Department Two.—November 14, 1904.]

Consolidated Cases.

C. A. HOOPER et al., Respondents, v. L. N. FLETCHER et al., Respondents, and JAMES H. BARKER et al., Appellants.

FRANK OLMO et al., Appellants, v. L. N. FLETCHER et al., Respondents.

MECHANICS' LIENS—FORECLOSURE—FINDING AS TO LIEN FOR ATTORNEYS' FEES—SUPPORT OF JUDGMENT—ISSUES—NEW TRIAL.—In an action to foreclose mechanics' liens, a finding of fact, upon which the land of the owner was charged with a lien for attorneys' fees, to the effect that after payment of the fund into court the owner had entered into a contest with certain claimants as to the disposition of the fund, which finding is necessary to support the judgment for such lien, is not outside of the issues upon which the court was called upon to pass, and is reviewable upon motion for new trial, on the ground that such finding is unsupported by the evidence.

ID.—APPEAL FROM ORDER GRANTING NEW TRIAL—REVIEW OF ORDER—NEW TRIAL AS TO ATTORNEYS' FEES AND COSTS.—Where the order granting a new trial generally was made, after failure of the plaintiffs to comply with an order to the effect that it would be granted if attorneys' fees were not remitted, the order granting a new trial for insufficiency of the evidence to sustain a finding thereupon will be affirmed, so far as it grants a new trial upon the issue as to attorneys' fees and costs, and the respondents will be allowed to recover their costs of appeal.

ID.—OWNER, WHEN NOT LIABLE FOR INTEREST OR COSTS.—Where the building contract appears to be valid and the owner before the trial of actions to foreclose mechanics' liens pays the residue of the fund properly remaining in his hands as due to the contractor, to be applied toward the payment of the claimants of liens, the owner is not liable for interest or costs.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a new trial. Thomas F. Graham, Judge.

The facts are stated in the opinion of the court.

Wickliffe Matthews, for Frank Olmo et al., Appellants.

Barna McKinne, and E. Bianchi, for Andrew Christensen, Appellant.

William H. Jordan, for Joost Brothers, a Corporation, Appellant.

Richard Percy Henshall, and Wilmer Muma, for James C. Powers, Appellant.

C. L. Dam, for J. B. Powell, Appellant.

J. S. Macks, and William Tomsky, for Lowry & Daly, Appellants.

Stafford & Stafford, for Henry Simas and Jane Simas, Respondents.

William F. Sawyer, for C. A. Hooper et al., Respondents.

Walter S. Brann, for E. B. Bailey et al., Respondents.

Daniel C. Deasy, for W. H. Preble et al., Respondents.

Hu Jones, for E. Davies et al., Respondents.

L. N. Fletcher, Respondent, *in pro. per.*

McFARLAND, J.—These are consolidated cases brought to foreclose mechanics' liens against a house and lot of land on which it stands, owned by the defendant Henry Simas. Judgment was rendered for plaintiffs and certain defendants and cross-claimants, but afterwards a motion of defendant Simas for a new trial was granted, and from the order granting the new trial certain parties have appealed.

SIMAS, the owner of the land, entered into a written contract with the defendant Fletcher for the construction of the house in question for \$2,050, payable in four equal installments. The appellants are persons who furnished labor and materials for Fletcher. Simas made the first two payments,

but retained the last two, amounting to \$1,025, and this last-named sum was the only amount in which he was liable to the lienholders, provided the said contract with the original contractor Fletcher was a valid one under the Mechanic's Lien Law. The contract, in form and substance, was in compliance with the law; but it was averred in the complaints that it was void because it had not been recorded—in which event the lienholders would be entitled as against Simas to the full amounts of their liens, which greatly exceeded the said \$1,025. Simas answered denying that the contract had not been recorded, and averring that it had been so recorded and was a valid contract. This was the only issue he made in his answer; he admitted that he had the said \$1,025 in his hands, averred his readiness to apply it to the payments of the liens, and that he had paid it into court; and asked the court to determine the shares of each lienholder in the fund, and that his property be released from the liens. He had not then, in fact, paid the money into court as averred, but he did so before the trial. The court found in his favor as to the issue of the validity of the contract with Fletcher, that it had been duly recorded and was a valid lien, and that "the amount of the contract price that is liable to the liens and claims of plaintiffs and defendants who are cross-complainants herein is the sum of . . . \$1,025, and the said property is subject to said liens for said sum." But the court found in finding XII "that said defendant Henry Simas answered to the complaints of plaintiffs and cross-complaints of defendants herein, and participated in the trial herein and entered into a contest in favor of certain defendants and lien claimants, and against certain other defendants and lien claimants, and generally contested as to the disposition of said fund so deposited, and delayed and harassed plaintiffs and defendants, who were lien claimants in the collection of their claims out of said fund." And the court decreed that in addition to the said balance of \$1,025 unpaid on the contract price, there should also be a lien on the said premises of Simas for a large amount of attorneys' fees, amounting to five hundred dollars, and also interest on the \$1,025 from January 30, 1900, which was the thirty-fifth day after the completion of the building,—and judgment was so entered. Defendant Simas moved for a new trial on various statutory grounds, and, among

others, the insufficiency of the evidence to justify the decision, and specified its insufficiency to sustain the finding XII above quoted. The court granted the motion for a new trial, but had made a previous order to the effect that such motion would be granted unless within a stated time "counsel fees and interest are remitted," which was not done. From this order granting a new trial this appeal is taken.

Of course, the general rule is, that the order of the trial court granting a new trial will not be disturbed here unless an abuse of discretion in making the order clearly appears; and we see no such abuse in this case. The court was clearly warranted in holding that the said finding XII was not supported by the evidence; and upon that finding alone could the lien for the attorneys' fees be sustained. As to the only question which the respondent Simas raised by his answer he was the prevailing party, and there was no ground for imposing a lien on his hand for these onerous attorneys' fees, in addition to the balance due on the contract unless the facts found in finding XII were true. That finding was obviously made in view of the decision in *De Camp Lumber Co. v. Tolhurst*, 99 Cal. 631, which was a mechanic's lien case, and in which the court said that "The appellants, however, retained the money, and apparently without cause or right raised a contest on every point and fought the case through to the end. By so doing they delayed the respondents in recovering money to which they were justly entitled and put them to unnecessary expense. Under such circumstances, we think the respondents' costs and attorneys' fees were properly allowed and made payable out of the proceeds of the property ordered to be sold."

Appellants contend, however, that the question whether the attorneys' fees were properly allowed was a pure question of law, and could not be reached on a motion for a new trial. The position taken is, that there can be a new trial only on an issue of fact; that, under former decisions, the trial court may award attorneys' fees in a mechanic's lien case whether or not there is any averment, or prayer, or traverse on that subject in the pleadings, and may allow such fees in excess of the amount prayed for; that as pleadings on the subject are not necessary, there can be no issue of fact involved; and that, therefore, finding XII is outside of the issues and should be

entirely disregarded. In answer to this technical point of view, it might, we think, be properly said that as appellants made no such point in the court below or in the proceedings on motion for a new trial, they are equitably estopped to raise it here for the first time. But however that may be, we think that the question disposed of by finding XII was properly before the court for adjudication, and presented an issue of fact the determination of which is reviewable on a motion for a new trial. It is true that issues of fact are generally raised by specific averments and denials in the pleadings; but in a case like the one at bar the law imposes upon the court the duty of determining whether attorneys' fees should be allowed, and, if so, for what amount; and upon this question each party has the right to introduce evidence. It cannot be said, therefore, that a finding of fact as to attorneys' fees is really outside the issues in the sense that it has nothing to do with the case and is to be totally disregarded. The law itself brings the question of attorneys' fees into the case for adjudication, and when, as in the case at bar, the court makes a finding of fact on this subject, which finding is necessary to the support of the judgment, such finding, like any other finding of fact, is reviewable on motion for a new trial.

We are of the opinion that the defendant was not liable for interest or costs.

The order granting a new trial is affirmed so far as it grants a new trial upon the issue as to attorneys' fees. In all other respects said order is reversed, and the cause is remanded for retrial solely upon the issue as to attorneys' fees and costs, the respondents to recover costs of appeal.

Henshaw, J., and Lorigan, J., concurred.

Rehearing denied.

[S. F. No. 2917. Department One.—November 15, 1904.]

DODGE STATIONERY COMPANY, Respondent, v. J. S. DODGE, and J. S. DODGE COMPANY, Appellants.

INJUNCTION—INTERFERENCE WITH GOOD-WILL OF BUSINESS—FRAUDULENT REPRESENTATIONS AS TO IDENTITY.—An action may be sustained to enjoin the defendants from attempting by fraudulent representation to the effect that plaintiff's business is defendants' business to appropriate the benefit of the good-will of plaintiff's established business.

IE.—USE OF DEFENDANT'S SURNAME — INTENTION — CONSISTENCY OF FINDINGS.—Where the plaintiff's established business had used the surname of an individual defendant, as a part of the good-will of the plaintiff's business while he was connected with it, a finding as to his intention to show his connection with the defendant corporation is not inconsistent with a finding that he and his fellow-corporators caused his name to be adopted therein with the intent and for the purpose of defrauding the plaintiff and appropriating to their own benefit the good-will of plaintiff's business.

ID.—SUPPORT OF FINDINGS.—Upon a review of the evidence in such action, *held*, that the findings therein for the plaintiff are sustained by sufficient testimony.

ID.—OWNERSHIP OF GOOD-WILL OF CORPORATE BUSINESS—VENDIBLE INTEREST—RIGHTS OF STOCKHOLDERS.—The good-will of the business of the plaintiff corporation is the property of the corporation alone, and can be transferred only by it. The defendant, whose surname was used as an essential part of such good-will, and who was a stockholder in the plaintiff corporation, had no vendible interest in its good-will, and could not upon ceasing to be a stockholder transfer such good-will or any part thereof.

ID.—RIGHT TO USE OF ONE'S OWN NAME—RESTRICTION.—Though the stockholder whose name was used by the plaintiff corporation, by his consent, has the right after he ceases to be a stockholder therein to use his name in the same line of business, if he does so legitimately, and cannot be restrained therefrom by contract; and though the corporation has no proprietary interest in his name, yet he is entitled to the good-will of its business, and he cannot be permitted to injure it by palming off its business as his own.

ID.—RIGHTS OF TRADING CORPORATION — EXPECTATION OF CONTINUED PATRONAGE—PROTECTION IN EQUITY.—A trading corporation may, equally with a private person, have a well-founded expectation of continued public patronage, which constitutes the good-will of its business, under section 992 of the Civil Code, and may be pro-

tested by a court of equity against acts of the character complained of.

ID.—RIGHT TO USE OF NAME IN FORMING NEW CORPORATION.—INTERFERENCE WITH PRIOR CORPORATION WITH SIMILAR NAME.—Though an individual has the right to do business in his own name, if he does so legitimately, yet he cannot confer upon a new corporation the right to use his name for the purpose of enabling it to engage in a business which had been conducted by a prior corporation under a similar name, which he had caused the prior corporation to use, where the similarity of names would create confusion, and enable the new corporation to obtain the business of the prior corporation.

ID.—INJUNCTION TO RESTRAIN SIMULATION.—In such case injunction will lie in favor of the prior corporation against the new corporation, and the defendant whose name is used by it to restrain the simulation so far as may be necessary to protect the rights of the prior corporation. The courts interfere in such cases solely for the purpose of preventing fraud, actual or constructive.

ID.—ACTUAL FRAUDULENT INTENT NOT ESSENTIAL.—It is immaterial whether the surname used by the plaintiff in its business was used by the defendant corporation on its signs with actual fraudulent intent. If the natural and necessary consequence of defendant's conduct was such as to cause deception, said defendant, knowing the facts, must be held to the same responsibility, even if it acted under the honest impression that no right of the plaintiff was invaded.

ID.—USE OF DEFENDANT'S NAME BY PLAINTIFF NOT A MISREPRESENTATION.—The use by the plaintiff of the corporate name conferred upon it by the act of the individual defendant is not a misrepresentation of the fact that any person of that name is connected with it after he ceased his connection therewith. The name, by his acts, had become so bound up in the plaintiff's business as to indicate the business itself carried on by it; and it indicated nothing more after his retirement.

ID.—EXTENT OF INJUNCTION.—Though in other respects the injunction granted was warranted by the case presented, it should not go to the extent of enjoining the defendant corporation from using its corporate name in some other line of business, nor should it enjoin the individual defendant in the matter of using his own name in carrying on the stationery business, to any greater extent than is necessary to protect against fraud.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. M. C. Sloss, Judge.

The facts are stated in the opinion of the court.

A. E. Shaw, J. F. Riley, and Page, McCutchen, Harding & Knight, for Appellants.

A man has an inalienable right to the use of his own name, and any use of which incidentally interferes with the business of another having the same name is *damnum absque injuria*. (*Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169; *Brown Chemical Co. v. Meyer*, 139 U. S. 540; *Turton v. Turton*, (1889) 42 Ch. Div. 128; *Hanson v. Halkyard*, 22 R. I. 102; *Cutter v. Gudebrod Bros.*, 36 App. Div. 362; 55 N. Y. Supp. 298, 304 (s. c. 44 App. Div. 605, 61 N. Y. Supp. 225); *Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill. 127; *De Long v. De Long etc. Co.*, 10 Misc. Rep. 577; 32 N. Y. Supp. 203, 206; *Marcus Ward & Co. v. Ward*, 61 Hun, 625; 15 N. Y. Supp. 913; *Duryea v. National Starch Co.*, 79 Fed. 615; 101 Fed. 117; *Rock Springs Dist. Co. v. Monarch*, 15 Ky. Law Rep. 866; 22 S. W. 1028.)

Mastick, Van Fleet & Mastick, for Respondent.

The defendants should be absolutely enjoined from the use of a deceptive name interfering with the value of the goodwill of plaintiff's business. (*Weinstock v. Marks*, 109 Cal. 529, 538, 539;¹ *Spiker v. Lash*, 102 Cal. 38; *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271;² *C. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462;³ *Garrett v. Garrett & Co.*, 78 Fed. 472; *Holmes v. Holmes etc. Co.*, 37 Conn. 278;⁴ *Wyckoff v. Howe Scale Co.*, 110 Fed. 520; *Penberthy Injector Co. v. Lee*, 120 Mich. 174; *Wm. Rogers Co. v. Rogers etc. Co.*, 11 Fed. 495; *Walter Baker & Co. v. Sanders*, 80 Fed. 889; *Cash v. Cash*, 82 L. T. (N. S.) 655; *International Silver Co. v. Rogers Co.*, 110 Fed. 955; *Shaver v. Heller*, 108 Fed. 821; *Clark Thread Co. v. Armitage*, 67 Fed. 896; *Le Page Co. v. Russia Cement Co.*, 51 Fed. 943; *Stuart v. F. G. Stewart Co.*, 91 Fed. 243; *Schmid v. De Grauw*, 27 Misc. Rep. 693; 59 N. Y. Supp. 569; *De Long v. De Long etc. Co.*, 89 Hun, 399.) Though actual fraud strengthens the case, actual fraudulent intent is not essential where the name itself is a deception, or the acts done cause deception. (*Tussand v. Tussand*, 44 Ch. Div. 678, 693; *Le Page v. Russia Cement Co.*, 51 Fed. 941, 946.

¹ 50 Am. St. Rep. 57.

² 82 Am. St. Rep. 346.

³ 43 Am. St. Rep. 762.

⁴ 9 Am. Rep. 324.

947; *Holmes v. Holmes etc. Co.*, 37 Conn. 295, 296;¹ *Stuart v. F. G. Stewart Co.*, 91 Fed. 243; *Taesdstiksfabriks etc. v. Myers*, 139 N. Y. 364; *Fuller v. Huff*, 104 Fed. 141, 145.)

ANGELLOTTI, J.—This action was brought to obtain a decree enjoining the defendants from maintaining certain signs, doing business under certain names and designations, or using the same in the conduct of their business, using or exhibiting certain samples, and enjoining the defendant corporation from using its corporate name, or any other name in colorable imitation of plaintiff's corporate name, in the conduct of its business.

Plaintiff had judgment substantially in accord with the prayer of its complaint, and defendants have appealed from such judgment.

The findings of the trial court and allegations of the complaint which are not denied by the answer show the following facts:—

Plaintiff was incorporated in August, 1894, for the purpose of buying, selling, and dealing in books, periodicals, and stationery, and carrying on a general engraving, typographing, and printing business, and has ever since been engaged in said business in the city and county of San Francisco. Defendant J. S. Dodge was one of the incorporators, its first president, and its general manager until September 17, 1900, when he sold and transferred all his stock to another, since which time he has not been a stockholder in the corporation, in any way interested therein, an officer thereof, or in its employ.

In March, 1896, plaintiff moved its place of business to No. 112 Post Street, and in March, 1899, to No. 123 Grant Avenue, where the business has ever since been conducted.

During the period that the business was being conducted at these places, with defendant J. S. Dodge as manager, said defendant Dodge usually advertised and conducted the business of plaintiff under the name of "Dodge's," that being the only name or device placed in a conspicuous manner on the signs used, and the signs used at 123 Grant Avenue containing simply the word "Dodge's," and no other word or designation whatever, and these conditions have ever since

¹ 9 Am. Rep. 324.

continued to exist. It was always the custom of plaintiff to stamp on the back of envelopes sold by it the word "Dodge's," with a designation of the street and number of its place of business.

During the time that the business of plaintiff has been conducted at these two places it has become well and favorably known to its customers as "Dodge's" and under that name plaintiff has built up and is now carrying on a large and profitable business, the corporate name being used only on billheads and correspondence.

Within a few months after parting with his stock in plaintiff corporation and ceasing to be interested therein,—viz., on January 2, 1901,—defendant J. S. Dodge, with four others, organized defendant corporation, the "J. S. Dodge Company," for the purpose of engaging in the same character of business as that followed by plaintiff. Said J. S. Dodge Company and J. S. Dodge hired a store at No. 209 Post Street, in the same block in which plaintiff's place of business is situated, and only one hundred feet distant therefrom, and placed thereon a conspicuous sign, as follows: "Dodge will occupy these premises on his return from New York with a complete stock of up-to-date stationery, etc., about March 1st." The word "Dodge" thereon was displayed in very large and conspicuous letters.

On April 1, 1901, they opened their stationery business therein, and have ever since maintained the same, the only signs displayed being several containing simply the word "Dodge," in large letters, and a large marble slab in the sidewalk in front of the store, containing simply the words "Dodge, Stationer." They have also stamped the envelopes sold by them with the words "Dodge's, 209 Post St., S. F.," and have done other things calculated to convey the impression that their establishment and that of plaintiff are identical.

There is not now, and has not been since September 17, 1900, any person by the name of "Dodge" connected in any way with plaintiff corporation.

The court also found that J. S. Dodge and his fellow-incorporators caused the name "J. S. Dodge Company" to be adopted as the name of defendant corporation, with the intent and for the purpose of defrauding the plaintiff, appropriat-

ing to their own benefit the good-will of plaintiff's business, and deluding and deceiving the customers of plaintiff and the public into the belief that the business theretofore conducted by plaintiff was being conducted by defendants; that the store at 209 Post Street was hired by the defendants, and the announcement by sign was made by them that "Dodge" would occupy the premises, for the same purpose and with the same intent; and that "if said defendants are permitted to continue to carry on said business at the place aforesaid, with the sign aforesaid, and under said corporate name, the customers of plaintiff and the public generally will be deceived and misled into believing that the store where the defendants are so conducting business is the store of plaintiff," to the great damage of plaintiff.

The court further found that J. S. Dodge had been engaged in the stationery, etc., business in San Francisco for more than twenty-five years, either individually, in partnership, or as stockholder in corporations; that in all firms or corporations with which he has been connected, the name "Dodge" has been used by him in the title of the firm or corporation; that he has during said time built up a large trade by his personal endeavor, "and has used said name 'Dodge' or 'Dodge's' for the purpose of notifying the public . . . and his patrons generally of the fact that he was connected with said partnership or corporation, and giving his personal attention and supervision to the business by them carried on." There was no finding that there was any fraudulent intent on the part of the defendants in so far as the use of the signs "Dodge" and "Dodge, Stationer," on and about the store at 209 Post Street, after the commencement of business therein was concerned, and the complaint contained no allegation as to any fraudulent intent in this respect.

The trial court by its decree enjoined defendants and each of them from maintaining in connection with their business at 209 Post Street, or at any other place where they may conduct a similar business, the signs now maintained, or any sign containing the name "Dodge" or "Dodge's" with or without initials or other words or devises, unless accompanied by an express and conspicuous statement that the business carried on under such sign is not the business heretofore carried on by plaintiff, and is not the business heretofore carried on

under the name of "Dodge's" and is not the business heretofore carried on at No. 112 Post Street and No. 123 Grant Avenue; from in any way carrying on such business under such names or any designation containing such names, without such accompanying statement; from using such names, or any description in any way containing such names, in the conduct of such business, without such an accompanying statement; and also enjoined defendant corporation from using its corporate name, "J. S. Dodge Co.," as its corporate name, and from doing any business under said name, or any name in colorable imitation of the corporate name of plaintiff.

We cannot say that the findings of the court as to the intent with which the defendant Dodge used his name in the title of the firms and corporations with which he had been connected are necessarily inconsistent. An intent to show his connection with the defendant corporation, J. S. Dodge Company, may have coexisted with an intent of himself and fellow-incorporators therein to adopt a certain corporate name for the purpose of misleading and deceiving the customers and patrons of plaintiff in the manner alleged and found.

Nor can we hold that the findings of the court are not, in all respects, either sustained by sufficient testimony or admitted by the pleadings.

As is usually the case, the intent must be determined from the acts and the circumstances attending their commission, and here the acts and circumstances were such as to sustain the conclusions of the trial court as evidenced by the findings. Under the circumstances appearing, there can be no doubt as to the correctness of the conclusion of the trial court as to the effect upon plaintiff's business of allowing defendants to continue their business at 209 Post Street with the signs now there and under said corporate name.

The question, then, is as to whether, upon these facts, plaintiff was entitled to any relief, and, if so, the extent thereof.

This action is not based upon the theory that by the sale of his stock in plaintiff corporation there was any transfer by defendant Dodge of the good-will of the business or of any good-will. The vendor of stock in a corporation has no vend-

ible interest in the good-will of the business carried on by the corporation, and cannot transfer any part thereof. The good-will of a business conducted by a corporation is the property of the corporation alone, and can be transferred only by it. It is not claimed, therefore, that Dodge, by the sale of his stock, contracted not to engage in the stationery business, for had he so purported to do, which he did not, his contract would have been void under the provisions of sections 1673 and 1674 of the Civil Code, there having been no transfer of the good-will of the business. (*Merchants Ad Sign Co. v. Sterling*, 124 Cal. 429.¹) Admittedly, defendant Dodge, having terminated his connection with plaintiff, had the right to engage, whenever and wherever he saw fit so to do, in the same character of business as that carried on by plaintiff. Nor is the action based upon the claim of any proprietary interest in the name "Dodge's" or "Dodge."

The basis of plaintiff's action is, that defendants are attempting by fraudulent representations, to the effect that plaintiff's business is defendants' business, to appropriate the benefit of the good-will of plaintiff's established business. The rule upon which a judgment in favor of plaintiff must rest was well stated in *Weinstock v. Marks*, 109 Cal. 529, 539,² where this court, speaking through Mr. Justice Garoutte, said: "The fundamental principle underlying this entire branch of the law is, that no man has the right to sell his goods as the goods of a rival trader. . . . We think the principle may be broadly stated, that when one tradesman resorts to the use of any article or contrivance for the purpose of representing his goods or his business as the goods or business of a rival tradesman, thereby deceiving the people by causing them to trade with him when they intended to and would have otherwise traded with his rival, a fraud is committed—a fraud which a court of equity will not allow to thrive." This doctrine has been repeatedly stated in different forms by the courts, and is universally recognized, and we do not understand it to be disputed here. As pointed out in *Shaver v. Heller*, 108 Fed. 821, there is a distinction between a suit for the infringement of a trade-mark and an action to restrain unfair competition in trade. In the latter case, to which this action belongs, no proprietary interest in

¹ 71 Am. St. Rep. 94.

² 50 Am. St. Rep. 57.

the words or device imitated is requisite. It is sufficient that the plaintiff is entitled to the good-will of a business, and that this good-will is injured or is about to be injured by the palming off of the business or goods of another as his.

In passing, it may be said in response to a contention of defendants, that it appears clear to us that a trading corporation may, equally with a private person, have a well-founded expectation of continued public patronage, and this constitutes the good-will of its business (Civ. Code, sec. 992), which may be protected by a court of equity against acts of the character complained of. (*Weinstock v. Marks*, 109 Cal. 529, 539.¹)

Coming to the application of the principle under discussion, it is obvious that there is a very material distinction between the rights of the defendant Dodge and the defendant corporation, the J. S. Dodge Company. Dodge himself being entitled to engage in the stationery business, had the unquestionable right to engage in that business in his own name, so long as he did not resort to any artifice or contrivance for the purpose of producing the impression that the place of business conducted by him and that conducted by plaintiff were identical. It does not follow, however, that he could confer the right to use his name upon a corporation for the purpose of enabling that corporation to engage in a business which had been conducted by another corporation under a similar name, and it is well settled that he could not so do. This must be especially true where he himself caused the use of his name by the prior corporation. The distinction has been made in several cases. As has been said by the courts, a person comes naturally by his name from his parents, and it is a thing personal to himself, which in truth and in justice he has the right to use, provided he does not resort to artifices calculated to produce deception or confusion in the public mind between him and some other person to the injury of the latter, while the name given to a corporation is an artificial and impersonal thing, selected arbitrarily by the incorporators themselves, and which can be selected from an entire vocabulary of names. "To say that one has the right to select his own name as the designation of a corporation is but another way of stating that he has a right to select any title from

¹ 50 Am. St. Rep. 57.

among the whole range of names; but it is not equivalent to a statement that he can give his own name to a corporation with a view to making it similar to that employed by other persons in the same business, to their or the public's injury." (*De Long v. De Long etc. Co.*, 89 Hun, 399, and 32 N. Y. Supp. 203. See, also, *Rogers etc. v. Rogers etc.*, 11 Fed. 495, 499.)

The defendant corporation is a distinct person in the law from J. S. Dodge, and its legal rights in the matter of the selection and use of a corporate name are precisely the same as if J. S. Dodge had never been connected with it. Whoever its incorporators might be, they had no right to fraudulently adopt a name similar to plaintiff's name for the purpose of palming off the business to be conducted by the new corporation as plaintiff's business, and thus invade the rights of the prior corporation. If the name so adopted was so similar to the name of the prior corporation as "to create confusion and enable the later corporation to obtain, by reason of the similarity of names, the business of the prior one." injunction will lie to restrain the simulation so far as may be necessary to protect the rights of the prior corporation, even to the extent of prohibiting the use of the name at all, the courts interfering in such cases solely for the purpose of preventing fraud, actual or constructive. (See *C. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462;¹ *De Long v. De Long etc. Co.*, 89 Hun, 399; *Garrett v. T. H. Garrett & Co.*, 78 Fed. 472; *Penberthy Injector Co. v. Lee*, 120 Mich. 174; *Schmid v. De Grauw*, 37 Misc. Rep. 693; 59 N. Y. Supp. 569.)

As to the similarity of the corporate names in this case, when the surrounding circumstances are taken into consideration, it is only necessary to refer to the opinion of the New York court of appeals in *C. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462.¹ While the names are not identical, and, standing alone, without taking into consideration the business conducted by defendant corporation, and for which it was formed, are not perhaps so similar as to justify a court from interfering, when we take into consideration the fact that defendant corporation was organized for and is conducting a stationery business, the similarity is apparent at once. As in the Higgins Case, so here, as between these parties, the case is

¹ 143 Am. St. Rep. 769.

precisely the same as if defendant's corporate name contained a designation of its business, and the word "stationery" had been placed therein, making it the J. S. Dodge Stationery Company.

As to the rights of the courts to restrain such a company from using on its signs the term "Dodge's," a name under which plaintiff's business has become well and favorably known to the public, and under which plaintiff has built up a large and profitable business, or any term so similar thereto as to mislead the public into believing that the defendant's place of business is the same establishment that has been maintained by plaintiff under that name, there can be no question.

The term "Dodge" is of this character. It is not defendant's corporate name, and defendant corporation had no right to conduct its business under that name, in such a way as to convey the impression that it is the business conducted by plaintiff as "Dodge's." The fact that a man named Dodge is a stockholder therein or the manager thereof cannot, as we have already seen, affect this question. If the defendant corporation had desired simply to show that the J. S. Dodge who had formerly been connected with plaintiff had severed his connection therewith, and was now the manager of defendant, it could have done it in such a way as to invade no right of plaintiff.

It appears also to be immaterial in this connection whether or not such term, "Dodge," was used on the signs with actual fraudulent intent. If the natural and necessary consequence of said defendant's conduct in this respect was such as to cause deception, said defendant, knowing the facts, must be held to the same responsibility even if it acted under the honest impression that no right of the plaintiff was invaded. (*Higgins etc. Co. v. Higgins Soap Co.*, 144 N. Y. 462.¹)

As to the defendant J. S. Dodge, the plaintiff was also entitled to an injunction. While it is undoubtedly true that he has the right to engage in business in his own name, the books are full of cases to the effect that one will not be allowed to resort to any artifice or contrivance in the use of his own name for the purpose of deceiving the public as to the identity of his business or products. The cases generally, includ-

¹ 43 Am. St. Rep. 769.

ing several of those cited by learned counsel for defendants, recognize this qualification of the right to use one's own name. In *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, the first case cited by defendants upon this point, it is declared by the United States Supreme Court that though one may so use his name he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or the articles produced by him. It is the manner of the use rather than the use of the name itself that is prohibited in such cases.

In the case at bar the defendant Dodge adopted a method of indicating the new business carried on by him and the new corporation practically identical with that which he had previously caused the plaintiff to adopt, and under which its business had been built up, and was well and favorably known. That method was the placing on the signs the surname "Dodge" alone, indicating that the business theretofore carried on by plaintiff as "Dodge's" was being carried on at the new place. The natural and necessary consequence of using this name in this manner would be to mislead plaintiff's customers and divert plaintiff's trade, and Dodge must have known this. Each case of this character must depend upon its own circumstances, and we are of the opinion that the circumstances of this case are such as to justify a court in restraining defendant Dodge from the use of his own surname in such a manner as to cause the public to believe that a stationery business conducted by him is the same stationery business as that conducted by the plaintiff. The use of such surname in the manner indicated was entirely unnecessary to the exercise of the right of Dodge to do business in his own name, and was an artifice or contrivance which the law will not tolerate to another's detriment.

It is urged that plaintiff's complaint is devoid of equity in that, by the use of the word "Dodge's" it is attempting to trade upon the reputation of J. S. Dodge, who is no longer connected with it. Its use of the signs "Dodge's" without qualifying words, it is said, is a representation that J. S. Dodge is still connected therewith. The soundness of the principle invoked by defendants in support of their contention cannot be disputed. If the plaintiff had made any false representation in the respect stated, we would have a differ-

ent case. There has certainly been no misrepresentation in the matter of plaintiff's corporate name, and we do not understand that any such is claimed. It bears the name "The Dodge Stationery Company," the name selected by the defendant J. S. Dodge for it. That name does not import any declaration that there is any Dodge now connected with it. Upon this point it is sufficient to refer to the opinion in the case of *Holmes etc. v. Holmes etc. Co.*, 37 Conn. 278.¹

As to the use of the word "Dodge's" by plaintiff, the business conducted by plaintiff corporation has become well and favorably known under that name. It may be that the skill and management of J. S. Dodge contributed in some degree to the favorable reputation of plaintiff, but it is immaterial what contributed thereto. The name "Dodge's" through J. S. Dodge's own acts, became so bound up with plaintiff's business as to indicate the business itself carried on by it, the Dodge Stationery Company, and the mere continuance of the use of that name after the retirement of Dodge indicated nothing more.

We have examined such rulings of the trial court in the matter of the admission of evidence as are complained of, and find nothing that could have prejudicially affected defendants' case.

The court below was justified in granting an injunction as against both defendants. We are, however, of the opinion that in some respects the injunction granted was, as is urged by defendants, too broad, and unnecessary to a proper protection of plaintiff's legal rights. Some cases have been cited by plaintiff in which the decree has absolutely enjoined the use of the name of the person or corporation, but an examination of these cases will develop the fact that in those cases generally, such extreme relief was absolutely essential to prevent a continuance of the fraud and the ensuing damage. Each case must necessarily stand upon its own facts.

The only object of a court of equity in such cases being to protect against the fraudulent representations, it will go no further than is necessary to accomplish that result. Any further step is an encroachment upon the legal rights of the defendant.

So far as the defendant corporation is concerned, the decree

¹ 9 Am. Rep. 324.

of the court is fully warranted, except in so far as it is enjoined from using its corporate name in any class of business different from that of plaintiff, or from using in such different class of business any other name in colorable imitation of plaintiff's corporate name. So long as the defendant corporation does not trench upon plaintiff's line of business, it should be at liberty to use its corporate name or any other name as it pleases.

As to the defendant Dodge, we do not see how it can be essential to the protection of the public or of the legal rights of plaintiff that he should be restrained from using his own name in the carrying on of the stationery business, if he chooses to engage therein, at some other place than No. 209 Post Street, unless he so qualifies that name by explanatory statements as to make the use extremely burdensome.

It may well be, as claimed by plaintiff, that as to the store at No. 209 Post Street, such an impression has been created by the misleading signs and statements, which will continue unless removed by defendants themselves, as justifies the relief granted against Dodge as to that place. So far as the decree enjoins Dodge from doing any of the acts specified therein at No. 209 Post Street, it was warranted by the case presented, and will not be disturbed.

So far, too, as the decree prohibits him from causing any business similar to plaintiff's to be carried on in the city and county of San Francisco under the simple designation "Dodge" or "Dodge's," or with signs containing those words alone, without a qualifying statement to the effect that the business so carried on is not the business heretofore carried on by plaintiff under the name "Dodge's" at No. 112 Post Street and No. 123 Grant Avenue, and from in any manner representing that any such business carried on by him is the same business heretofore carried on by plaintiff, or from in any way designating such business simply "Dodge" or "Dodge's," it was warranted by the case presented.

The decree should, in our opinion, so far as the defendant Dodge is personally concerned, go no further than this, and must be modified accordingly.

The cause is remanded to the superior court, with directions to modify the judgment in the respects indicated herein,

and when so modified said judgment shall stand affirmed. Defendants shall not recover their costs on this appeal.

Shaw, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[S. F. No. 3884. Department One.—November 16, 1904.]

ETTIE KOWALSKY, Respondent, v. JOSEPH N. KOWALSKY, Appellant.

ACTION FOR DIVORCE—TEMPORARY ALIMONY—MERITS OF CASE—GOOD FAITH.—In an action for a divorce, where the complaint states a *prima facie* case, and there is no issue as to the marriage, the merits of the case are not to be considered in the allowance of alimony *pendente lite* further than is necessary to determine whether the wife is acting in good faith, and not for the mere purpose of obtaining money from the husband.

ID.—ALLOWANCE OF COUNSEL FEES—INACCURACY NOT PREJUDICIAL—AUTHORITY OF COUNSEL.—The direction of the court in the allowance of counsel fees, that they be paid to the plaintiff or her counsel, while inaccurate in expression, is not such an irregularity as to justify an interference therewith upon appeal. Counsel would have the authority to receive the money if the order was silent in reference to the matter.

ID.—PROPRIETY OF ALLOWANCE—COMPARATIVE OWNERSHIP OF PROPERTY—DISCRETION OF COURT.—Where it was alleged in plaintiff's affidavit, and substantially admitted in defendant's affidavit, that the defendant owned property worth about one hundred thousand dollars, and had an income of about six hundred and fifty dollars per month, and it appeared that the plaintiff owned corporation stocks of the value of about seven hundred dollars, it was within the discretion of the court to make an allowance to plaintiff of alimony *pendente lite* in the sum of one hundred dollars per month, and of counsel fees in the further sum of two hundred and fifty dollars.

ID.—HOME FOR PLAINTIFF—IMMATERIAL FACT—MERITS OF CASE—CRUELTY OF HUSBAND.—The fact that the defendant had a home in which he was willing that plaintiff should live during the pendency of the action is immaterial where it involved the merits of the case, the plaintiff having alleged that she was driven from the home by the cruelty of the husband.

APPEAL from an order of the Superior Court of the City and County of San Francisco allowing alimony and counsel fees pending an action for divorce. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

H. I. Kowalsky, and T. J. Crowley, for Appellant.

Campbell, Metson & Campbell, for Respondent.

SHAW, J.—In this action for divorce the defendant appeals from an order requiring him to pay to the plaintiff the sum of one hundred dollars a month for her support during the pendency of the action and the further sum of two hundred and fifty dollars for counsel fees.

If we were hearing an appeal on the merits we might be disposed to scan carefully the allegations of cruelty to determine whether a cause of action is well stated. But the marriage is admitted in the answer, and a cause of action for extreme cruelty is sufficiently stated to make out a *prima facie* case. The purpose of allowing alimony to the wife during the pendency of the action is to enable her to live in the mean time and to employ counsel who can properly present her case to the court, both in the pleadings and in the introduction of evidence. The merits of the case, where there is no issue as to the marriage, will not be considered on an application for such alimony further than is necessary to determine that the wife is proceeding in good faith and not for the mere purpose of obtaining money from the husband. (*Storke v. Storke*, 99 Cal. 622; *Langan v. Langan*, 91 Cal. 654; *Poole v. Wilbur*, 95 Cal. 339; *Hite v. Hite*, 124 Cal. 389.¹)

The direction that the counsel fees allowed be paid "to the plaintiff or to her counsel," while inaccurate in expression, is not a sufficient irregularity to justify the interference of this court. The addition of the words "or to her counsel" does not change the character of the order as an allowance to the plaintiff, and was probably intended only to indicate that her counsel should have authority to receive the money. Counsel would have the authority although the order was silent in regard to the matter, and hence the addition was

¹ 71 Am. St. Rep. 82.

unnecessary, but we cannot see how its insertion could in the least injure the appellant.

It was within the discretion of the court to award the plaintiff temporary alimony and counsel fees, notwithstanding the fact that it appeared that the wife was the owner of some corporation stocks of the value of seven hundred dollars or thereabout. The plaintiff alleged in her affidavit that the defendant owned property worth one hundred thousand dollars and was in the receipt of an income of six hundred and fifty dollars per month. The defendant made no denial of this allegation further than to say that his property was not worth one hundred thousand dollars, and that his monthly income was not six hundred dollars. This was equivalent to an admission that the value of his property and the amount of his income, respectively, were one dollar less than these sums. The court might well conclude that, with such abilities on the part of the husband, it would not be fair to the wife to compel her to sell all that she had in order to raise money wherewith to live and prosecute her action.

The fact that the defendant had a home in which he was willing that the plaintiff should live during the pendency of the action was not material. It involved the merits of the action. The plaintiff alleged that she had been driven from that home by the cruelty of the husband. It would be deciding the case in advance of the trial to allow evidence to show that she was not justified in living apart from him.

The order is affirmed.

Angellotti, J., and Van Dyke, J., concurred.

[S. F. No. 8093. Department Two.—November 17, 1904.]

GEORGE C. ALFERITZ et al., Respondents, v. A. CAHEN and H. CAHEN, as Copartners, Defendants; H CAHEN, Appellant.

JUDGMENT—DENIAL OF MOTION TO VACATE—DISCRETION—APPEAL—

Upon appeal from an order denying a motion to vacate a judgment for mistake, under section 473 of the Code of Civil Procedure, the sole question is whether the discretion of the trial court was abused, and if no such abuse plainly appears, the order will be affirmed.

Id.—JUDGMENT BY DEFAULT—COPARTNERS JOINTLY SUED—MISTAKE OF

ATTORNEY.—*Held*, that under the facts of the case it cannot be said that there was an abuse of discretion in denying a motion by one of two defendants sued jointly as copartners to set aside a judgment by default for mistake of their attorney in not remembering that both defendants were sued, and in making default under the instructions of one of them, who had no ability to pay the judgment, nor to defend the action.

Id.—ATTORNEY AND CLIENT—QUESTION OF NEGLIGENCE AND MISTAKE OF

ATTORNEY—CLIENT BOUND, NOTWITHSTANDING HARDSHIP.—Where questions of negligence and mistake of an attorney arise, there must always come a time when, notwithstanding the hardship to the client, he must be bound by the errors or omissions of his attorney.

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing to set aside a judgment by default. M. C. Sloss, Judge.

The facts are stated in the opinion of the court.

M. S. Eisner, and Reinstein & Eisner, for Appellant.

Lyman I. Mowry, for Respondents.

HENSHAW, J.—This is an appeal by H. Cahen, one of the defendants, from an order denying his motion to vacate a judgment against himself. The motion was made under section 473 of the Code of Civil Procedure, and reliance was had principally upon the ground of the mistake of his attorney.

The action was commenced in 1894 against the defendants, as copartners, under the firm name of A. Cahen & Son, for

the conversion of seventeen bales of wool. The defendants answered by general denial. The case slumbered for some six years, during which time plaintiff had died, and his personal representatives had been substituted. Defendants' attorney, not having had occasion during this time to refresh his memory as to the facts, had forgotten that the action was against A. Cahen and H. Cahen, and assumed that it was against A. Cahen alone. His mistaken belief in this regard was promoted, if not prompted, by the fact, as appears from his affidavit, that the partnership had been dissolved before the date of the alleged conversion, and that as a consequence, if there had been a conversion of plaintiff's goods, the defendant H. Cahen was not responsible therefor. The attorney for the plaintiffs came to the attorney for the defendants, stating that the estate of Alferitz was ready for settlement, and said that the pending litigation should either be compromised, or that the case should be tried. Defendants' attorney, still in the mistaken belief that the sole defendant was A. Cahen, said that he would communicate with his client touching the compromise. He did so communicate with A. Cahen, who expressed his inability to pay anything, and instructed his attorney not to defend the litigation. Plaintiffs' attorney, being notified that a compromise was impossible, proceeded to have the cause set for trial, and served proper notices upon defendants' attorney. These notices disclosed the fact that the action was against the two Cahens, but they were actually received by the managing clerk of defendants' attorney, and were not seen by defendants' attorney himself. Defendants' attorney, being instructed by A. Cahen not to defend the action, and still entertaining the mistaken belief that A. Cahen was the only defendant, failed to appear at the time of the trial. At that time plaintiff made his proofs and recovered judgment against both of the defendants. H. Cahen was doing business under the name of the California Fruit Evaporating Company. Execution was issued and levied upon his property in that company, whereupon his attorney, with due diligence, moved for a vacation of the judgment against H. Cahen, which motion was denied.

The sole question presented to this court upon an appeal such as this is whether or not there has been an abuse of the discretion vested in the trial court, either in granting or in

refusing the motion. Where such abuse has been plainly shown this court has lent its aid in correction of it, but in all other cases relief has been denied. The whole consideration has been well summed up by Mr. Justice Harrison in *Ingrim v. Epperson*, 137 Cal. 370, where it is said: "The rule has been so often declared as not to need the citation of authorities, that the action of the superior court, upon an application to set aside a default or grant relief therefrom, rests so largely in its discretion that it will not be disturbed on appeal, unless it shall be made clearly to appear that there was an abuse of this discretion. While it has been said in some cases that this discretion is better exercised when it tends to bring about a decision of the cause upon its merits, the rule itself has never been relaxed. This observation has been in the nature of advice to the superior court, and not for the purpose of compelling it to decide in that mode. Unless the record clearly shows that the court has abused its discretion, its order, whether it be to grant or deny the application, will be affirmed."

While it may be conceded that if the trial court in this case had reached the opposite determination, and had vacated its judgment, to the end that H. Cahen might be permitted to defend the litigation upon its merits, this court would not have disturbed the conclusion. Upon the other hand that is very far from a declaration that the decision which the court actually reached was unwarranted, and therefore an abuse of its discretion; for, while conceding that the attorney for defendant was laboring under a mistake, there was still to be considered whether or not the mistake was one entertained under such circumstances as to entitle the party to relief. Herein are to be considered the circumstances that the answer of H. Cahen nowhere discloses a special defense, but rests merely upon general denial. Further, that plaintiffs' attorney, in his conversations with defendants' attorney, always spoke of the defendants in the plural, and that there was nothing in the language of defendants' attorney to lead plaintiffs' attorney to believe that defendants' attorney was laboring under any mistake. Still further, that the notices served upon defendants' attorney showed plainly and properly who the defendants were, and even if those notices did not come under the eye of defendants' attorney, they were

received by the managing clerk of defendants' attorney. Where such questions of negligence and mistake arise, there must always come a time when, notwithstanding the hardship to the client, he must be bound by the errors and omissions of his attorney. It may not be said that it was an abuse of the discretion of the trial court to hold in this instance that he was so bound.

The order appealed from is affirmed.

McFarland, J., and Lorigan, J., concurred.

[S. F. No. 3784. Department One.—November 18, 1904.]

In the Matter of the Estate of W. B. SHIVELY, Deceased.
DAN SHIVELY and WILLIAM B. SHIVELY, Administrators, Appellants, v. R. L. HARRIS et al., Creditors, Respondents.

**ESTATES OF DECEASED PERSONS—FINAL ACCOUNTS OF ADMINISTRATORS—
PAYMENTS UPON AUTHORIZED MORTGAGE—PROBATE HOMESTEAD.—**

Where the court had authorized a mortgage upon the real estate of a decedent the proceeds of which were used in paying debts and expenses of administration, and, subsequent to the mortgage, had set apart a probate homestead out of a portion of the mortgaged premises, the administrators had the right to apply the whole of the proceeds of the sale of the residue of the mortgaged premises toward the payment of the mortgage on the probate homestead; and it was error for the court to refuse to allow credit therefor in the final account of the administrators.

ID.—DUTY OF COURT AS TO PROBATE HOMESTEAD—UNENCUMBERED REAL ESTATE.—It was the duty of the court, before the property was mortgaged, to set apart a probate homestead from the unencumbered real estate, regardless of the creditors of the estate, which could not afterward be mortgaged. A mortgage mistakenly authorized thereon should be paid out of moneys realized from the sale of other property belonging to the solvent estate.

ID.—CHARGE UNSUSTAINED BY EVIDENCE—OPINION OF JUDGE.—Where a charge against the administrators for rent received was unsustained by evidence appearing in the record, it must be deemed erroneous. The opinion of the judge giving his reasons for the charge, tending to justify it, is not evidence, and is no part of the record.

12.—ACCOUNT NOT EVIDENCE—NEGLECT OF APPELLANT—PRESUMPTION.—

The account of the administrators is not evidence as to contested items; and where the appellant has not pointed out the evidence as to items charged or items disallowed as credits, it must be presumed that the evidence sustains the items charged, and does not sustain the items disallowed.

APPEAL from an order of the Superior Court of Humboldt County settling the final account of administrators G. W. Hunter, Judge.

The facts are stated in the opinion.

Henry L. Ford, and J. S. Burnell, for Appellants.

J. N. Gillett, for Respondents.

COOPER, C.—This is an appeal by the administrators of the above estate from an order settling their final account. Several items were charged to the administrators or disallowed, which are the subjects of controversy here. These items we will dispose of in the order presented.

1. The first is the sum of \$535.29 which the court ordered charged to the administrators. Pending the administration of said estate, the administrators, by authority of the court, executed a mortgage, to the Savings Bank of Humboldt County for the sum of eighteen hundred dollars. The code authorizes such mortgage to be made when it appears to the court to be for the advantage of the estate. (Code Civ. Proc., secs. 1577, 1578.) The administrators credited the estate with the eighteen hundred dollars, and the same was evidently used in paying the debts and expenses of administration. The mortgage covered about fourteen acres of land, which was afterwards sold to one French, and also about one hundred and twenty-two acres, which was, subsequent to the execution of the mortgage, set aside by the court as a probate homestead for the minor children. The fourteen-acre tract, not included in the homestead, was afterwards sold to one French for seven hundred and fifty dollars. The bank demanded the payment of six hundred and fifty dollars of the seven hundred and fifty dollars before it would release the fourteen acres from the mortgage, which was accordingly paid to the bank. The court refused to allow the item to any

greater extent than \$114.71, "that sum being the relative proportion that the mortgage on the homestead bore to the mortgage on the fourteen acres sold according to their respective values." There is no claim made that the administrators received the \$535.29, but it is claimed, and the trial court held, that they could not apply it on the mortgage, upon the theory that the moneys of the estate could not be used for the purpose of paying off an encumbrance upon a probate homestead. In this we think the learned judge was in error. The homestead had been encumbered by the administrators for the benefit of the estate. The money obtained by the mortgage became assets of the estate. The administrators had the right to use the money of the estate for the purpose of paying its debts. Suppose they had borrowed the eighteen hundred dollars on their own responsibility and credited the estate with it, using it for paying the debts of the estate,—does any one doubt that they could have paid themselves from the proceeds of the sale of the fourteen acres as far as it would go? The code (Code Civ. Proc., sec. 1465) provides that where no homestead has been selected and recorded by the deceased that the court "must select, designate, and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife and the minor children."

The above section is imperative, and the court has no discretion in the matter. (*Estate of Ballantyne*, 45 Cal. 696; *In re Davis*, 69 Cal. 458.) It was then the duty of the court in this estate, before the property was mortgaged, to set apart a homestead from the unencumbered real estate, and this regardless of creditors of the estate. The homestead laws are to be liberally construed with a view of securing shelter, care, and support for the widow and minor children. If the court in this case had set apart the homestead before the mortgage was executed, it would have ceased to be assets of the estate, and could not afterwards have been mortgaged by the administrators. The court would have had the right to set aside the one hundred and twenty-two acres unencumbered as a homestead, and to have ordered the fourteen acres sold. It certainly had the right to allow the proceeds of the fourteen acres to be used to assist in paying off the encumbrance which it had authorized on the homestead. There is no question as to creditors involved. The estate is solvent, and the

administrators cannot be allowed to deprive the minor children of a homestead because the court authorized a mortgage upon it, when it would not have done so if the facts had been called to its attention.

In case the mortgagee had brought suit to foreclose the mortgage the parties owning the homestead would have had the right to a decree that the land not included in the homestead be first sold and the proceeds applied toward the satisfaction of the mortgage debt, and if the proceeds had been sufficient to pay off the mortgage to have the homestead premises freed of the encumbrance.

The *Estate of Huelsman*, 127 Cal. 275, is not in conflict with what has been said. In that case the lien of the mortgage upon the property set apart as a homestead existed at the death of the deceased. The court therein properly held that there is no provision for paying off liens on probate homesteads, but it was speaking of liens that existed at the death of deceased. It did not hold that the administrators could not pay off liens on a probate homestead, which they, of their own volition, contrary to the spirit and intent of the law, had placed there.

2. The court ordered the administrators to be charged with "\$100, rent received from W. B. Meakin." Appellants call our attention to the evidence of Daniel Shively, one of the administrators, that neither he nor his co-administrator had received from Meakin any other sums than stated in the account. Respondents have not called our attention to any evidence in support of the ruling on this item, nor have we been able to find any. There are certain reasons given in the opinion of the trial judge which would tend to justify his action, but the opinion is not evidence, and is no part of the record. Regarded as a brief, it does not point out any evidence to justify the decision as to this item. Therefore the court erred in charging the administrators with this one hundred dollars.

3. The court directed that the administrators be charged with two hundred and fifty dollars as stumpage for pepperwood logs, and twenty-five dollars as stumpage for redwood taken for shingle-bolts, taken by the administrators off lands of the estate. The evidence supports the action of the court in this regard. It seems that the court exercised its

discretion in favor of the administrators as to the amount of the stumpage and the price in each case, and its action must be upheld as to these items.

4. It is said: "The court erred in finding that the administrators sold a horse for the sum of \$50, and did not account for the same." As the appellant has not pointed out the evidence as to this item, we do not deem it our duty to search through the record for it. We will presume that the evidence sustains the finding as to this item.

5. The items "by cash paid for clothes and maintenance of Maud E. Shively, a minor, \$100, and Earnest E. Shively, a minor, \$18," were disallowed by the court. It is not pointed out as to why these items should have been allowed, nor is our attention called to the evidence to justify them. The pages and folios of the transcript to which our attention is called only show that the items were included in the account, but the account is not evidence as to contested items.

The decree should be modified, in accordance with what has been said as to the "item of \$535.29" and as to the item of \$100, rent from Meakin," and the administrators credited with said items, and as so modified affirmed. Appellants to recover their costs on this appeal.

Gray, C., and Harrison, C., concurred.

For the reasons given in the foregoing opinion the decree is modified in accordance with what has been said as to the item of \$535.29 and as to the item of one hundred dollars, rent from Meakin, and the administrators credited with said items, and as so modified affirmed. Appellants to recover their costs on this appeal.

Angellotti, J., Shaw, J., Van Dyke, J.

[Soc. No. 1294. Department Two.—November 18, 1904.]

**C. A. BOLAND, Respondent v. ASHURST OIL, LAND
AND DEVELOPMENT COMPANY, Appellant.**

CORPORATIONS—CONTRACT FOR SALES OF STOCK—ACTION FOR COMMISSIONS—FINDING—CONFLICTING EVIDENCE.—In an action against a corporation for commissions upon sales of its stock, under a contract to pay commissions for all sales made by the plaintiff or by his assistance, a finding made upon conflicting evidence that plaintiff assisted in making a sale to a particular person must be accepted upon appeal as correct.

ID.—FULL COMMISSION UPON PURCHASE MONEY—COMPROMISE OR NEGLIGENCE OF CORPORATION AFTER SALE.—The plaintiff was properly allowed a full commission upon the purchase money for a sale made through his solicitation, although the purchase was closed with an officer of the corporation upon payment to him of one fourth of the purchase money. The corporation could not deprive plaintiff of his commission after the sale either by agreeing with the purchaser to accept a less amount or by neglecting to collect from him the price at which it was sold.

ID.—IMPROPER ALLOWANCE OF COSTS—BLANK SPACE IN JUDGMENT—HARMLESS ERROR.—Where the plaintiff recovered less than three hundred dollars, the court should not have allowed costs in his favor; but where the judgment appealed from shows a blank space after the provision therefor, the error is harmless.

APPEAL from a judgment of the Superior Court of Stanislaus County and from an order denying a new trial. **L. W. Fulkerth, Judge.**

The facts are stated in the opinion.

O. B. Parkinson, and Dennett & Walthall, for Appellant.

L. J. Maddux, and Arthur L. Levinsky, for Respondent.

HARRISON, C.—Action to recover a balance due for commissions for services rendered in the sale of certain stock. Judgment was rendered in favor of the plaintiff for \$186.25, with interest thereon from September 1, 1901, from which and from an order denying a new trial the defendant has appealed, contending that the court erred in allowing the plaintiff any commission upon the sale to Underwood and in the amount allowed upon the sale to Brown.

The agreement between the parties, as found by the court, is, that the defendant agreed to pay a commission to the plaintiff "for all sales made to persons by the plaintiff, or to any persons by the assistance of the plaintiff." Whether he is entitled to a commission upon the sale to Underwood depends upon whether he assisted in making the sale. Upon this issue there was conflicting testimony, and the finding of the court that he assisted in procuring Underwood to purchase the stock must be accepted as correct.

The sale to Brown was of two thousand shares for the sum of one thousand dollars, and was also made through the solicitation of the plaintiff. The purchase was closed by Brown with one of the officers of the defendant upon the payment by him of two hundred and fifty dollars, instead of requiring him to pay for the full amount of the purchase, and the defendant, without the knowledge or consent of the plaintiff, agreed with him that he might pay the balance whenever he wished to, and has since made no effort to collect it. The court properly allowed a commission upon the full amount of the sale. The defendant could not deprive the plaintiff of this commission after the sale had been made by agreeing with the purchaser to accept a less amount or by neglecting to collect from him the price at which it was sold.

At the trial the plaintiff testified that he received as commission on the Courtright sale \$9.40. The court should have allowed the defendant this amount as a credit upon the plaintiff's claim.

In its findings, the court held that the plaintiff was entitled to recover his costs from the defendant. As the plaintiff recovered less than three hundred dollars, this was error; but as no costs are included in the judgment—the provision therefor being followed by a blank space—the error is harmless.

We advise that the superior court be directed to modify its judgment by deducting therefrom, as of the date of its entry, the sum of \$9.40, with interest thereon from September 1, 1901, to that date, at the rate of seven per cent per annum, and as so modified that the judgment and order be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons stated in the foregoing opinion the superior court is directed to modify its judgment by deducting therefrom, as of the date of its entry, the sum of \$9.40, with interest thereon from September 1, 1901, to that date, at the rate of seven per cent per annum, and, as so modified, the judgment and order are affirmed.

McFarland, J., Lorigan, J., Henshaw, J.

[S. F. No. 8929. Department One.—November 19, 1904.]

In the Matter of the Estate of SETH W. CLISBY, Deceased.
MRS. ANNE CLISBY, Appellant, v. MRS. ETHEL CLISBY et al., Respondents.

HOLOGRAPHIC WILL.—DATE.—LIST OF PROPERTY.—A holographic will commencing with the words "Property of S. W. Clisby, October 1, 1902," followed by a list of his property, and giving all of his property to his wife, is sufficiently dated. It is immaterial that the latter part of the will containing the bequest was written on a subsequent day. The testator may adopt as the date of his will the date previously written by him.

ID.—PETITION TO REVOKE PROBATE.—DEMURRER.—INTENTION OF TESTATOR NOT ALLEGED.—Where a demurrer was properly sustained to a petition to revoke the probate of the holographic will, upon the facts alleged, and there is nothing in the petition to indicate that the document probated as a will was not in intention one continuous instrument, the question will not be considered as to an intention, not alleged, to make a mere list of property, with no thought of making a will, and as to a subsequent intention, not alleged, to make it a will as a mere afterthought.

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing to revoke the probate of a will. James M. Troutt, Judge.

The facts are stated in the opinion.

Van Ness & Redman, for Appellant.

Edwin L. Forster, and Robert B. Moody, for Respondents.

SMITH, C.—This is an appeal from an order refusing to revoke the probate of a will. The appellant is Mrs. Anne

Clisby, the mother of deceased and contestant of the will; the respondents, Mrs. Ethel Clisby, widow of deceased and sole beneficiary under the will, and Hulme, administrator with the will annexed. The will is holographic, and is in the words and figures following:—

"Property of S. W. Clisby, October 1, 1902	
Deposit Union Trust Company.....	\$22,755.00
" Cal. Safe Dep. Co.....	32.50
	330.00
J. K. Meyers Acct. Truck & Team.....	300.00
J. D. Gove Note.....	200.00
Louis Volmer Acct. Buggy.....	40.00
C. H. Lehmers, Acct. I. O. U. tag.....	50.00
Con Roman, Acct. I. O. U. tag.....	50.00
L. A. Blasingame.....	44.45
James Lawrence Acct. Note (!).....	20.00
	<hr/>
	\$23,852.63
Merchants' Exchange.... .	500.00
Buggy	300.00
Cash in Business..
	<hr/>

"At my death all the above property and any other property that may be found to belong to me is to go to my wife and to her alone, and I omit intentionally all other members of my family.
S. W. CLISBY."

The only facts alleged in the appellant's petition as grounds for revoking the probate are in effect that one of the numbers appearing in the document was altered, all of the numbers then erased, and the last paragraph written, on a day subsequent to the writing of the first part of the will; but all of this, it is alleged, was done by Clisby himself. A demurrer to the petition was interposed, and sustained, without leave to amend; and thereupon the judgment or order appealed from was entered.

Upon the facts stated—which are confessed by the demurrer—it is claimed by the appellant: 1. That on the face of the document it appears not to have been dated; and 2. That the concluding paragraph was written on a subsequent day.

In support of the former proposition it is urged, "that the words and figures 'October 1, 1902,' were not intended by the testator to express *the date of the instrument*, but merely the date *upon which he was the owner of the specified property*." But this contention is untenable. There is indeed a certain ambiguity in the instrument. For, grammatically, the date used may be regarded either as the date of the memorandum or as the date of the will. But the difference is immaterial. For, on the former construction, the memorandum being part of the will, its date would be the date of the will also. Nor do we doubt the right of the testator to adopt as the date of his will the date previously written by him.

Nor is the case affected by the fact alleged, that the concluding part of the will was not written on the day the will was commenced. It is a very common thing for men to commence a letter or other document on one day and to finish it on the next or some subsequent day; and in such case the date, whether written at the beginning—as is usually the case—or at the end—as is sometimes done—is, according to the common and received usage of language, the proper date of the writing; and this is equally true of legal documents, though these do not take effect until completed and delivered. We do not doubt, therefore, that the case comes within the meaning and intention of the enactments concerning holographic wills (Civ. Code, secs. 1276, 1277; Code Civ. Proc., sec. 1309), which, it is provided, are to be construed according to "the approved usage of the language." (Civ. Code, sec. 13; *Estate of Fay*, ante, p. 82.)

In the argument on this point, it is assumed by the appellant's counsel that it appears from the allegations of the petition that the memorandum of property was written by the testator on the date given with "no thought of making a will"; and, in effect, that the intention of using it as part of a will was an afterthought. But this—assuming it to be material—is not alleged. All that is alleged is simply that the writing of the concluding part of the will was on a day subsequent to its commencement. Nor is there anything in the petition to indicate that the document probated as a will was not in intention "one continuous instrument." (*Estate of Taylor*, 126 Cal. 98, 99.) Whether, were it otherwise, the

fact would be material is another question, which, as in the case cited, we leave undetermined.

Respondent's counsel are also in error in supposing that "it did not appear in the Skerrett case (67 Cal. 585), that the letter annexed to the deed was written at a date *other than the date when the deed was made.*" The contrary appeared from the records before the court. The deed was dated "April 26, 1881," and was acknowledged April 27th, and the letter, as appears from its recitals, was written subsequently.

We advise that the judgment appealed from be affirmed.

Gray, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Angellotti, J., Shaw, J.

Van Dyke, J., concurred in the judgment.

Hearing in Bank denied.

[S. F. No. 2940. Department One.—November 19, 1904.]

TERESA BELL, Appellant, v. MARY E. PLEASANT et al., Respondents.

ACTION TO CANCEL DEEDS—UNRECORDED DEED TO PLAINTIFF—RECORD OF SUBSEQUENT DEEDS UNDER GRANTOR—BONA FIDE PURCHASE—BURDEN OF PROOF—FINDING AGAINST EVIDENCE.—In an action to cancel deeds, where the plaintiff asserts title under a prior unrecorded deed, and the defendants claim under recorded deeds resting upon a subsequent recorded deed from plaintiff's grantor, under which the grantee took no title as such, the burden of proof is upon each of the defendants not only to show that his conveyance was executed and recorded, but also to show that he was a *bona fide* purchaser for value, without notice of plaintiff's rights under his prior deed; and in the absence of proof by the defendants that they took without such notice, a finding to that effect is against the evidence.

ID.—AVERMENTS OF COMPLAINT—ANTICIPATION OF DEFENSE—BURDEN OF PROOF NOT CHANGED.—The fact that the complaint unnecessarily anticipated a possible defense, and alleged that the second grantee and each of his successors, including the last grantee, took their

respective deeds with knowledge of the fact that the land was the property of the plaintiff, which was denied by the answer, does not require the plaintiff to prove such averments or change the burden of proof from the defendants to show that they were *bona fide* purchasers for value without notice. Mere proof of value does not change the burden from the defendants in such case.

Id.—CASE OVERRULED.—The case of *Smith v. Yule*, 81 Cal. 184, upon the subject of the burden of proof under an unrecorded deed, must be deemed overruled.

Id.—CASES DISTINGUISHED—EQUITABLE TITLE—POSITION OF LEGAL TITLE—PRESUMPTION.—Cases relative to the burden of proof upon a plaintiff who rests upon an equitable title or right, to show notice of his equity to a subsequent grantee of the legal title for value, have no application to a case where the legal title is in the plaintiff, and his grantor has no title left to convey, and the defendants must show a change of legal condition, which cannot be presumed in favor of a second grantee from plaintiff's grantor.

Id.—PRIOR TRUST-DEED AS SECURITY.—The fact that prior to plaintiff's title the technical title was in trustees under a trust-deed to secure a debt, which was kept in force by renewals of the debt, is not material to the respective rights of the plaintiff and defendants, all of whose claims to ownership are alike subject to the trust.

Id.—EVIDENCE—INTENTION OF SECOND GRANT AS MORTGAGE—REBUTTAL OF CLAIM—DECLARATIONS OF GRANTOR.—Where the plaintiff claimed that the deed from plaintiff's grantor to the second grantee was intended as a mortgage to secure a debt, and conveyed no title, the declarations of the grantor to the plaintiff at and subsequent to the conveyance were admissible in favor of the defendant grantees, with respect to that particular question, to rebut such claim.

Id.—COSTS—TRANSCRIPTION OF TESTIMONY UNDER ORDER OF COURT.—Where the transcript of the testimony was written up under a previous order of the court, directing that the expense should be borne equally by both sides, the prevailing party is entitled to include the amount paid by him for such expense as part of the costs in the case.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

T. J. Butts, and T. Z. Blakeman, for Appellant.

Edmund Tauszky, and Wallace A. Wise, for Lucius Solomons, Harry Block, Benjamin Harris, and Leo Block, Respondents.

Black & Leaming, for Assignee of Mary E. Pleasant, an Insolvent Debtor, Respondent.

SHAW, J.—This is an action by the plaintiff against the defendants to cancel a deed executed by the defendant Mary E. Pleasant to the defendant Solomons on February 4, 1897, and certain other deeds thereafter executed by the defendant Solomons and his successors whereby the title acquired by Solomons was vested in the defendant Leo Block. The defendants appeared and answered, and after trial findings were made in favor of the defendants and judgment was entered accordingly. The plaintiff appeals from the judgment and from an order denying her motion for a new trial.

The complaint in substance alleges that prior to September 27, 1891, the defendant Mary E. Pleasant held the legal title to the property as trustee for the use and benefit of the plaintiff; that on that day she executed a deed to the plaintiff conveying to her the property in question, but that said deed had never been recorded; that afterwards, on February 4, 1897, with the intention to cheat and defraud the plaintiff, the said Mary E. Pleasant executed another deed purporting to convey the same property to the defendant Solomons, which deed was duly recorded, and that subsequently, by mesne conveyances, the title acquired by Solomons under said deed became vested in the defendant Leo Block. It is further alleged that the defendant Solomons and each of his successors, including the defendant Leo Block, took their respective deeds with knowledge of the fact that the land was the property of plaintiff. The court found that Solomons and each of his grantees took their respective conveyances without any notice, knowledge, or information whatever, as to the claim, right, title, or interest of the plaintiff. It is contended by the plaintiff that this finding is not supported by the evidence.

It is not seriously contended by the defendants that there is any affirmative evidence to the effect that they, or either of them, received their respective deeds without notice of the rights of the plaintiff, and upon an examination of the evidence we find nothing in support of such finding. The claim of the defendants is, that the burden of proof to show notice

of plaintiff's right on the part of Solomons and his successive grantees rests on the plaintiff, and that, in the absence of evidence on the subject, the court necessarily made the finding that they took without such notice. In this we think the defendants are mistaken and the court erred. It has been repeatedly decided by this court that where one holding under an unrecorded deed brings an action involving the respective titles to the land against a subsequent grantee under a deed which is first recorded, the first grantee will prevail, unless the second grantee not only shows the making and recording of his deed, but also that he made his purchase and paid the price in good faith, and without knowledge of the rights of the previous grantee. The question depends on the effect of the rule embodied in sections 1214 and 1217 of the Civil Code, which are as follows: "1214. Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action. . . . 1217. An unrecorded instrument is valid as between the parties thereto and those who have notice thereof." The first case on the subject is *Long v. Dollarhide*, 24 Cal. 218, which was decided before the enactment of the code. It is there held that where a subsequent buyer whose deed is recorded claims title against a previous grantee under an unrecorded deed, the burden is upon the subsequent buyer to prove that he "is a purchaser in good faith and for a valuable consideration." The rule was laid down thus in *Eversdon v. Mayhew*, 65 Cal. 167: "To entitle a party to protection as such a purchaser, he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment." The same doctrine has been approved and followed by this court in the following cases: *Landers v. Bolton*, 26 Cal. 419; *Isenhoot v. Chamberlain*, 59 Cal. 639; *Wilhoit v. Lyons*, 98 Cal. 413; *County Bank of San Luis Obispo v. Fox*, 119 Cal. 64; *Beattie v. Crewdson*, 124 Cal. 579; *Alcorn v. Buschke*, 133 Cal. 658; *Kenniff v.*

Caulfield, 140 Cal. 45; *California C. F. Assn. v. Stelling*, 141 Cal. 719. It also prevails in the United States courts. (*Boone v. Chiles*, 35 U. S. (10 Pet.) 211.) In view of these numerous decisions it must be conceded that the rule contended for by the plaintiff is firmly established, notwithstanding one or two cases which seem to state the opposite rule. In *Fair v. Stevenot*, 29 Cal. 487, the opinion seems to be written upon the assumption that the burden in such cases was on the claimant under the prior unrecorded deed to show notice of his right to the second grantee, but there is nothing in the decision upon that exact point, and it cannot be taken as a statement of the doctrine. In *Smith v. Yule*, 31 Cal. 184,¹ it is said that notice, either actual or constructive, to the second grantee must be clearly shown before the claimant under an unrecorded deed can prevail against a subsequent grantee for a valuable consideration. The ground of this position, as stated, is, that if a second grantee, knowing of the previous conveyance, should nevertheless purchase the property and attempt to assert title thereto, such conduct would constitute fraud on his part, and that the case comes under the rule that fraud is never presumed, but must always be proven. This is the only case which states the rule contrary to the numerous decisions above cited, and it must be considered as overruled. There is a line of cases which the defendants contend establish a contrary rule, but upon examination it will be seen that there is a clear distinction between them and the case at bar. Thus it has been invariably held that in a suit by a beneficiary to enforce a resulting or constructive trust against a grantee of the trustee, in cases where the trustee held under a deed purporting to convey the legal title, without terms indicating the trust, it was incumbent upon plaintiff not only to prove the facts establishing a trust, but also to prove that the grantee of the trustee took his conveyance with notice of the equities of the plaintiff. In *Wyrick v. Weck*, 68 Cal. 8, which was a case of this character, the court said: "It is said that the defense of a *bona fide* purchaser without notice is in the nature of new matter, the burden of proving which is upon the defendant. Ordinarily this is so." And the court proceeds to show that in that particular kind of cases the rule is different. The same

¹ 89 Am. Dec. 167.

proposition is stated and the distinction noted in *Tillaux v. Tillaux*, 115 Cal. 674, and in *Warnock v. Harlow*, 96 Cal. 298. This principle is also applied in cases of suits by a purchaser under a judgment and execution sale against a grantee of the judgment debtor, where the plaintiff claims that the conveyance by the debtor to the grantee was fraudulent and void as against creditors. (*Casey v. Leggett*, 125 Cal. 666.) In such cases the burden is on the creditor to prove the fraudulent intent of the debtor in executing the deed. If thereupon the grantee proves that he paid a valuable consideration, the burden is then imposed on the creditor to prove notice of such fraudulent intent to the grantee at the time of his purchase, or before payment of the price. The underlying reason for this rule in these cases is, that as the debtor or trustee, as the case may be, holds the legal title at the time of the conveyance, the legal effect of his deed is to convey that title to his grantee, and thus there is established a legal condition which inures to the benefit of the grantee and cannot be changed in equity, except by proof of circumstances to show a superior equity in the party who disputes it. Equity follows the law, and a legal condition or *status* being once established, the burden of proof of facts necessary in equity to change the *status* is upon him who asserts the equitable right. A similar proposition was involved in *Garber v. Gianella*, 98 Cal. 527, and the same rule was applied. In *Wyrick v. Weck*, 68 Cal. 8, it is said: "If there were matters *in pais* tending to show notice of plaintiff's rights at the time of such purchase . . . it was necessary for the plaintiff to make the proofs; for without such proof the title must remain where plaintiffs have alleged it to be—in defendants." And in *Casey v. Leggett*, 125 Cal. 666, it was said concerning the deed by the debtor to his grantee, "the deed having been made for a valuable consideration and delivered to the grantee, the law presumes that the grantee rightfully acquired a title to the property." In the case at bar and other similar cases, however, the conditions are precisely the reverse and the principle operates against the defendant. A subsequent deed by the grantor to another person does not of its own force convey any title, for the grantor, having previously parted with his title, has left in himself nothing to convey and his deed alone can therefore convey

nothing. It can only be effective, as against the first grantee, when supplemented by proof that it was first recorded, and that the grantee therein named purchased for value and without notice of the prior deed, or of the rights of the first grantee. This, also, is an attempt to change a legal condition; the necessary facts cannot be presumed in favor of the second grantee, and hence the burden is on him to make the supplementary proof. The case of *Hart v. Church*, 126 Cal. 480,¹ is cited by the defendants in support of their contention on this point. In that case it was held that a purchaser of a negotiable instrument, having shown that he bought it for a valuable consideration before maturity, the plaintiff, in an action against him to cancel the note on account of fraud in procuring its execution, must prove that the purchaser, at the time he bought, had notice of the fraud. The same proposition is decided in *Jordan v. Grover*, 99 Cal. 194; *Eames v. Crosier*, 101 Cal. 263; and *Sinkler v. Sūjan*, 136 Cal. 356. These cases, however, manifestly rest upon the same ground as *Casey v. Leggett*, 125 Cal. 666; *Wyrick v. Weck*, 68 Cal. 8, and similar cases above cited. The indorsement carries the legal title to the note and vests it in the indorsee, and if it is shown by him that he bought for a valuable consideration before maturity, his legal title cannot be divested nor his right to recover defeated, without the proof which shows his purchase to have been fraudulent—namely, that he had notice of the lack of consideration or of the fraud, or other defense of the maker. They, in fact, apply the same principle as the many decisions above cited holding that in a suit between a prior grantee under an unrecorded deed and a second grantee whose deed is first recorded the burden is upon the second grantee to prove that he purchased without notice of the other's rights and for a valuable consideration. It follows that, in the absence of any evidence on the subject, the finding should have been in favor of plaintiff on this point.

Defendants claim that plaintiff must prove that defendants had notice because it is one of the facts alleged in her complaint and denied in the answer. This, however, is not the test. The plaintiff was obliged to prove only those facts which were necessary to constitute her cause of action. If

¹ 77 Am. St. Rep. 125.

she has alleged some fact not necessary to her case, but which is in effect a traverse of some fact which might have been alleged in defense to her action, and the defendant denies such allegation, this does not change the burden of proof, nor require the plaintiff to introduce any evidence upon that subject, until the defendant has produced evidence thereon which makes rebuttal evidence on her part necessary. She is not obliged thus to anticipate a possible defense.

The court found that at the time of the execution of the deed by Mary E. Pleasant to Solomons the plaintiff was the owner of the property. Hence the further finding that the deed to Solomons and his deed to his successors in interest were executed for a valuable consideration was not alone sufficient to defeat the title of the plaintiff and authorize a judgment for the defendants. It required the aid of the other finding, that Solomons or some one of the successive grantees under him took without notice of plaintiff's rights. As this latter finding is not sustained by the evidence, it follows that a new trial should have been granted.

We do not consider as important the facts which are undisputed that ever since the year 1883 the technical legal title to the premises has been vested in certain trustees to secure an outstanding debt of fifteen thousand dollars to the Savings and Loan Society, and that this trust has been kept in force by renewals from time to time. Since 1891 the plaintiff has been the owner of the property subject to the trust, and the rules we have been considering are as much applicable to her estate therein as they would be if the trust deed had not existed. None of the defendants claim any rights under the trust, but all rights of both plaintiff and defendants are alike subject thereto.

The plaintiff asserts that the court erred in admitting in evidence certain declarations of Mary E. Pleasant to the plaintiff at and subsequent to the execution of the deed from Pleasant to Solomons. The plaintiff's point is, that at the time the plaintiff was the owner of the property in controversy Mary E. Pleasant occupied the position of a previous owner, and that the declarations of a previous owner affecting title to the property, made after such owner has parted with the title, and not in the presence of the grantee, are not admissible against a grantee. There can be no dispute con-

cerning the correctness of this rule, but we do not think it is applicable in this particular instance. The defendants claimed title as innocent purchasers for a valuable consideration under a subsequent deed from the plaintiff's grantor. The plaintiff claimed that the deed from Mary E. Pleasant to Solomons, under which the defendants claimed, was in legal effect a mere mortgage to secure a debt, and hence that it did not convey any title whatever. The defendants were therefore required to meet both propositions; first, they had a right to show that Solomons, or any of his successors, was a purchaser for a valuable consideration without notice of the plaintiff's rights; and secondly, they had to meet the contention that the deed under which they claimed did not convey the legal title, but was in effect a mortgage. On the latter proposition it was competent to show the declarations made by Mary E. Pleasant at the time of the transaction and subsequent thereto with respect to that particular question. As we understand the record, these declarations were admitted solely for that purpose.

Plaintiff further alleges that the court erred in denying her motion to strike from the cost-bill the item of \$122.50 for one-half of the cost of transcribing the testimony. The item was properly allowed. Before the transcript was written up the court made an order that it should be done, the expense to be borne equally by both sides. Upon the making of this order, the prevailing party, having paid one-half of the cost of writing up the testimony, was entitled to have it included in the cost-bill and allowed as part of the costs of the case. (*Barkly v. Copeland*, 86 Cal. 493.) If the judgment and order had been affirmed upon this appeal, this item of cost would remain as a part of the costs properly chargeable against the plaintiff. It is necessary, however, to reverse the order denying a motion for a new trial, and the effect is, that this item of costs is again set at large to be determined by the court upon a subsequent trial of the case.

The judgment and order are reversed and the cause remanded for a new trial.

Angellotti, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

No. 2955. Department One.—November 21, 1904.]

CITY OF OAKLAND, Respondent, v. ROLAND W. SNOW
et al., Appellants.

CHARTER OF OAKLAND—COMPENSATION OF "AUDITOR AND ASSESSOR"—

SINGLE OFFICE—COMMISSIONS ON TAXES—LIABILITY ON OFFICIAL BOND.—Under the charter of the city of Oakland, the office of "auditor and assessor" is one single office, and the incumbent thereof is only entitled to the salary fixed for that office, and he is liable on his official bond for commissions retained on taxes collected and not paid into the treasury.

Id.—DESCRIPTION OF OFFICE IN BOND—"EX OFFICIO ASSESSOR"—OBLIGATION NOT AFFECTED.—

Though the charter describes the office as that of "auditor and assessor," and fixes the salary of the incumbent as such, yet where it also provides that "the auditor shall be *ex officio* assessor," and that there shall be elected "an auditor, who shall be *ex officio* assessor," and the incumbent was elected as "auditor and *ex officio* assessor," and the official bond was required by the city council by the latter description, the description so adopted in the bond is harmless, and does not affect the validity of the obligation, which is the same in legal effect as if the officer styled therein were "auditor and assessor," instead of "auditor and *ex officio* assessor."

Id.—DUTIES OF OFFICER—CONSTRUCTION OF BOND.—

The provisions of the charter respecting the duties required of the officer are read into the bond, and are to be construed in connection with it. There is no infringement of the strict rights of the sureties, by construing the meaning of the terms employed in the bond in accordance with recognized rules for the interpretation of contracts.

Id.—ADOPTION OF LAWS RESPECTING REVENUE AND TAXATION—COMPENSATION NOT AFFECTED.—

The adoption in the Oakland charter of the laws of the state applicable to the assessment, equalization, levy, and collection of taxes, and making the powers and duties of the city assessor the same as those of the county assessor, did not include any provisions of law respecting compensation for the collection of taxes, nor affect the compensation of the "auditor and assessor" as fixed by the charter.

Id.—ACTION ON BOND—FINDINGS—QUESTION OF LAW.—

In the action on the bond the findings are to be construed so as to sustain the judgment. A finding that the defendant collected the money "as assessor" or "as *ex officio* assessor" is of the same legal import; and a finding that he "failed to perform the official duties of such office as *ex officio* assessor" is equivalent to a finding that he failed to perform that portion of the duties of the office to which he was elected and for which the bond was given. It was a question of law

whether he was entitled to compensation for the collection of taxes, and an answer that he was so entitled did not raise an issue on which a special finding was required.

ID.—EVIDENCE PROPERLY EXCLUDED—CONSENT OF CITY—NOTORIETY OF CLAIM.—Evidence was properly excluded to show that the commissions on taxes collected were retained by defendant with the consent of the city, or that he declared prior to his election that he intended to claim the commissions, or that several city officials had approved of his act or consented thereto, and that it was a matter of public notoriety. The city could not consent to a violation of its charter or be estopped from claiming the money by the erroneous interpretation of its charter by its officials.

ID.—SUFFICIENCY OF EVIDENCE—AMOUNT RETAINED—CONVERSION.—Where the amount collected was shown, and the amount paid into the treasury during the term of office was shown, and there was no averment or evidence that any further amount had been paid, findings that plaintiff had failed to pay into the treasury the amount of the excess for which judgment was given, and that he appropriated the excess to his own use, were sufficiently sustained.

ID.—EXECUTION AND DELIVERY OF BOND—LOSS OF ORIGINAL—EVIDENCE—PRESUMPTION—SUPPORT OF FINDING.—Where the original bond was lost, and a copy was set out in the complaint and introduced in evidence, and the answer substantially admitted the execution of the original, and it was proved to have been delivered to the mayor, and by him to the city clerk, and was copied by the clerk into the register of official bonds, this, in connection with the presumption that official duty was regularly performed, is sufficient to support a finding that the original bond was executed and delivered to the city.

ID.—APPROVAL OF BOND NOT REQUIRED.—The original bond was a valid obligation of the principal and surety, without any approval by the mayor or city attorney.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. S. P. Hall, Judge.

The facts are stated in the opinion.

T. C. Coogan, and C. H. Wilson, for Appellants.

James A. Johnston, City Attorney, and Seymour W. Condon, Assistant City Attorney, for Respondent.

HARRISON, C.—The plaintiff seeks by this action to recover from the defendants upon a bond executed by them for

the faithful performance by the defendant Snow of his official duties the sum of \$1,868.32, alleged to have been received by him in his official capacity during his term of office and appropriated to his own use. Snow held the office of "auditor and assessor" of the plaintiff for two years, during the time for which the bond was given, and the moneys which the plaintiff seeks to recover are a portion of the taxes upon personal property collected by him by virtue of his office. Judgment was rendered in favor of the plaintiff, and the defendants have appealed therefrom and also from an order denying a new trial.

The collection of the moneys by Snow is not controverted, but the appellants claim that he has the right to retain the amount sued for as a commission allowed by law for their collection. On the other hand, the plaintiff insists that it was his duty to pay them into the treasury immediately upon their collection. The correctness of the judgment depends upon the construction to be given to various provisions of the charter of the city of Oakland (Stats. 1889, p. 514).

1. Section 44 of the charter provides: "The compensation of officers and employees of the city shall be per annum as follows: . . . auditor and assessor three thousand dollars"; and section 195 of the charter declares: "No office shall be created nor shall any person be employed in any capacity, nor shall any officer, clerk or employee receive any salary or compensation for any service of any kind unless the same is specially authorized by law or by this charter." Section 42 declares: "All fees and other moneys received or collected by any officer, agent or employee of the city (excepting only such fees as the city engineer may be authorized by ordinance to collect) shall be paid by such officer, agent or employee each month, or as much oftener as the council may require, into the city treasury for the use of the city." Under these provisions it is very clear that unless there is some law or some provision in the charter by which the defendant Snow is specially authorized to receive some compensation for his official services as such officer other than the salary above provided, he is not authorized to retain any moneys collected or received by him, but was required to pay them into the city treasury. The provision that "all moneys collected by any officer of the city shall be paid by such officer into the

city treasury for the use of the city" is as comprehensive and as exclusive of any right to retain any portion of such moneys as is the provision of the charter of San Francisco, considered in *Matter of Dodge*, 135 Cal. 512.

The appellants, however, contend that in addition to his salary he is entitled, under the provision of section 137 of the charter, to compensation for his services in collecting taxes upon personal property at the rate of six per cent upon the amount so collected. That section is as follows: "Except as in this article otherwise provided, the assessment of property taxable in the city for municipal purposes, the equalization of assessments and collection of taxes, and the sale of property for unpaid taxes, and the redemption of property sold for taxes, shall be made and had at the same time and manner, and with like effect as now or may be hereafter provided by law for the assessment of property, equalization of assessments, levy and collection of taxes, and sale of property for unpaid taxes for state and county purposes and redemption thereof; and all provisions of law applicable to such assessment, equalization, levy, collection and sale for state and county purposes are hereby applied to and shall be the law governing such assessment, equalization, levy, collection and sale for municipal purposes; and the respective officers of the city shall have, possess, and perform the same powers and duties in all matters concerning revenue and taxation for municipal purposes as are by law conferred or imposed upon county officers in matters concerning revenue and taxation for state and county purposes; and to that end:

"First. All powers and duties so by law conferred or imposed upon the county assessor, are hereby conferred and imposed upon the city assessor. . . .

"Sixth. All powers and duties so conferred or imposed upon the county clerk or county auditor are hereby conferred and imposed upon the city clerk and city auditor."

By this section the framers of the charter, instead of setting forth in detail the several steps to be taken for raising revenue for the city, adopted certain provisions of the general laws of the state upon the same subject. They have provided that the provisions of the general laws which may from time to time be prescribed for taking certain proceedings in levying and collecting taxes for state and county purposes

shall be the law governing such proceedings in levying and collecting taxes for municipal purposes; and that the said proceedings in reference to municipal taxes shall be taken "at the same time and manner and with like effect" as may be prescribed by law for such proceedings in reference to state and county taxes; and that in taking these proceedings the officers of the city shall have the same "powers and duties" as are by law given to county officers in matters concerning taxation for state and county purposes.

The incorporation into a statute of the terms of a prior statute merely by reference thereto is governed by the same principles in interpretation as govern the interpretation of statutes—the primary object in all cases being to ascertain and carry out the intention of the legislature. Mr. Endlich (Interpretation of Statutes, sec. 73) says: "The words of a statute are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the legislature has in view"; and again in section 101 states as the rule, "An act adopting another by reference, does not adopt it beyond the purposes of the new act." Mr. Sutherland (Statutory Construction, sec. 241) says: "The application of particular provisions is not to be extended beyond the general scope of the statute unless such extension is manifestly designed"; and in section 257 says: "By the adoption of another statute, only such portion is in force as relates to the particular subject of the adopting act." The rule was stated by Ashurst, J., in *Rex v. Justices of Surrey*, 2 T. R. 510, to be, that "All the general powers and provisions given and made in acts in *pari materia* are to be considered as incorporated into the new statute, but that such provisions as are always considered as special provisions shall not." And in *Williams v. Ellis*, 6 Q. B. Div. 176, it is said: "Where the words employed by the legislature do not directly apply to the particular case, we must consider the object of the act." (See, also, *Queen v. Badcock*, 6 Q. B. 787; *Jones v. Dexter*, 8 Fla. 276; *Matthews v. Sands*, 29 Ala. 136; *Succession of D'Aquin*, 9 La. Ann. 400.)

There is nothing in section 137 aforesaid by which any officer of the city is "specially authorized" to receive compensation for his services, nor does the section make any reference to the compensation of officers. Article VIII of

the charter in which this section is contained is headed "Revenue and Taxation," and the manifest purpose of the framers of the charter in inserting this section therein was to provide a mode for raising revenue for the city from taxes upon property. The purpose of giving to the proceedings in reference to municipal taxes "like effect" to that given in the same proceedings in reference to state and county taxes, and the clothing of municipal officers with the same "powers and duties" in reference thereto as is given to county officers is, that by these proceedings a valid lien or charge for the tax may be imposed upon the property assessed, and that the officers may have ample authority for enforcing the collection of the tax. It would be an unwarranted as well as an unnatural construction to hold that by the use of these terms the framers of the charter intended to make any provision for the compensation of the officers.

Neither can the clause in the section declaring that all the provisions of law applicable to the collection of taxes for state and county purposes shall be the law governing such collection for municipal purposes be construed as authorizing the municipal officers to receive compensation for their services in reference thereto. There can be no presumption that it was intended to incorporate into the charter the provisions of law upon any subject other than those which are therein enumerated. By designating certain proceedings connected with taxation, in reference to which it has adopted the provisions of the general law applicable thereto, there is necessarily excluded from such adoption any provision applicable to proceedings not designated, and it is not to be held that by specifying the "collection" of taxes it has also adopted a provision of law for the compensation of officers for their collection, even though such provision for compensation is found in the same statute with the law for the collection of taxes. There is no necessary connection between the collection of taxes and the compensation of officers for their collection, nor do the provisions of law "applicable" to their collection presumptively include a provision for such compensation. These provisions for the collection of taxes are directed to the relation between the officer and the taxpayer and create the "power and duty" of the officer in reference to the collection of the tax.

The provisions of law applicable to the levying and collection of taxes are found in the Political Code, but the provisions for the compensation of officers are not contained in that code. Section 3829 of this code, under which the appellants claim the right to compensation, does not itself fix the compensation, but refers to the County Government Act for the purpose of ascertaining whether any compensation for such services shall be received. This section is not to be held as containing any provision of law applicable to the "collection" of taxes merely because it is found in a chapter relating to that subject, but its character is to be determined by the purpose which is expressed in it, and that purpose is limited to the compensation for the collection of taxes which is contained in the County Government Act. By reference to section 215 of the County Government Act (Stats. 1897, p. 572), it is seen that in a majority of the counties of the state compensation is allowed, but that in some counties the assessor is not entitled to any compensation for this service.

It cannot therefore be held that any portion of this section of the County Government Act was incorporated into the charter of Oakland by reason of the terms of the above section 137. Not only is there not in it any general provision of law applicable to the collection of taxes, but the provision therein for compensation upon which the appellants rely is not operative throughout the state, but is a special provision fixing the compensation of the assessor in certain counties. It was enacted by the legislature in conformity with the provisions of the constitution (art. XI, sec. 5), requiring the compensation of county officers to be regulated "in proportion to duties," and as it cannot be determined that the provision for those counties in which compensation is allowed is more entitled to consideration than the provision for those in which it is denied, it cannot be held that any portion of the section is available to the appellants.

2. It appears from the record herein that at the city election in 1897 the appellant Snow received a majority of the votes cast "for auditor and *ex officio* assessor" and was declared elected to that office, and that a certificate declaring that he was duly elected auditor and *ex officio* assessor of the city of Oakland was issued to him by the city clerk; that he

thereafter took and filed an oath that he would faithfully discharge the duties of auditor and *ex officio* assessor of the city of Oakland to the best of his ability, and that he acted as auditor and *ex officio* assessor of the city of Oakland from April 5, 1897, to April 1, 1899; that the common council of the city fixed the bond to be given by the "auditor and *ex officio* assessor" at ten thousand dollars; that thereafter, and before entering upon the duties of the office, he executed to the city of Oakland a bond with the other appellant herein as surety, in which, after reciting that the appellant Snow was on the eighth day of March, 1897, elected to the office of auditor and *ex officio* assessor in and for the city of Oakland, they bound themselves in the penal sum of ten thousand dollars that he would well and faithfully perform all official duties required of him by law, and would well and faithfully execute and perform all the duties of such office of auditor and *ex officio* assessor required by any law to be enacted subsequent to the execution of the bond.

It is contended by the appellants that under the charter of Oakland there is no office of "auditor and *ex officio* assessor," and for that reason the bond sued upon is void, and they have cited certain cases in support thereof which arose where the appointment of the officer was made without any authority therefor, or where the office itself had never been authorized by law. It may be conceded that a bond given for the faithful performance of the duties of an office that has no existence would not create any obligation. If there is no office there can be no official duty to perform and no violation of official duty. The cases cited by the appellant upon this point are therefore inapplicable to a case where the bond sued upon has been given for the faithful performance of the duties of a legally existing office by one who has been properly appointed or elected thereto.

It is further contended by the appellants that under the charter of Oakland the offices of auditor and assessor are distinct; that if it be assumed that the bond in question is a valid obligation for the faithful performance by Snow of his duties as auditor, it does not cover his duties as assessor, and that as the complaint charges only a violation of his duty as assessor there can be no recovery upon the bond. The cases cited by the appellants in support of this proposi-

tion arose where there were two legally existing and separate offices held by the same individual, and it was held that in the absence of a statute making his bond given for one office cover his duties and liabilities in both, his bonds would cover only his defalcations in the office for which it was specifically given. In the revenue act of 1854 (Stats. 1854, p. 108), the legislature provided that in the several counties of the state the sheriff should be the tax-collector, and it was held in *People v. Edwards*, 9 Cal. 286, that inasmuch as the constitution required a tax-collector and sheriff to be elected in each county, it had thereby created the two offices, and although the legislature might provide that the same person should perform the duties of each office, it could not abolish either of the offices, and that the two offices were not by such provision blended into one. (See *Lathrop v. Brittain*, 30 Cal. 684.) It was under this provision of the constitution that it was held in *People v. Ross*, 38 Cal. 76, that the bond given by the defendant as surety did not cover his defalcation as tax-collector. In the County Government Act (Stats. 1883, p. 315, sec. 57), the legislature have specifically named the auditor and assessor as distinct officers of the county, but authorized the board of supervisors of any county to elect to consolidate the duties of the two officers. Section 59, however, provides that when they are so consolidated the person elected must give the bond required for each office.

There is no enumeration in the charter of Oakland of the several offices of the city, but article II, headed "Elections," which enumerates the officers to be elected provides: "At each general election there shall be elected: . . . An auditor who shall be *ex officio* assessor." In the article upon the "Executive Department," section 40 is entitled "Auditor and Assessor," and declares: "The auditor shall be *ex officio* assessor" and then prescribes the duties required of him "as assessor" and his duties "as auditor." Section 44, entitled "Salaries of Officers," declares: "The compensation of officers and employees of the city shall be per annum: . . . The auditor and assessor three thousand dollars." Section 45, entitled "Official Bonds," declares: "Every officer provided for by law shall, before entering upon the duties of his office, file an official bond in such sum as the council may direct."

Under these provisions it must be held that the charter of

Oakland has not created the office of assessor as a distinct office from that of auditor, but that, by requiring the duties of such functionaries to be discharged by the same person, it has created a single office for the purpose of discharging those functions, which is styled in the charter "auditor and assessor"; that as there is no office of assessor distinct from the officer of auditor, Snow was not required to give a bond for the faithful discharge of his duties as auditor, and another and separate bond for his duties as assessor, but that the bond set forth in the complaint was sufficient and applies to all of the duties required of him by virtue of his official position, and covers his defalcations in the moneys collected by him as charged in the complaint and found by the court. (See *People v. Leet*, 13 Ill. 269.)

The designation of Snow in the instrument as "auditor and *ex officio* assessor," instead of "auditor and assessor," is a trivial and harmless misdescription which does not affect the validity of the obligation. The charter itself declares that the auditor shall be *ex officio* assessor, and whether he styles himself auditor and assessor or auditor and *ex officio* assessor is immaterial. He is none the less assessor because he is only *ex officio* assessor, and being styled in the instrument auditor and *ex officio* assessor is the same in legal effect as if styled auditor and assessor. The bond that is given is the obligation of the individual whose duty it is to perform the duties of the office in his official capacity. The moneys collected by Snow were received by him by virtue of the official position to which he had been elected, and they are public moneys belonging to the city.

In so holding there is no infringement of the rule that a surety is entitled to stand upon the strict letter of his bond. The provision of the charter defining the duties of the officer are read into the bond and are to be construed in connection with it. The obligation of the surety is not extended beyond the fair import of the terms which it has employed in the instrument, but the meaning of those terms is to be construed in accordance with recognized rules for the interpretation of contracts. (See *People v. Breyfogle*, 17 Cal. 504.)

Upon the same consideration the objection of the appellants that the findings do not support the judgment must be overruled. Findings, as has been often decided, are not to be sub-

jected to the test of a special demurrer, but any ambiguity or uncertainty in them is to receive such construction as will sustain, rather than defeat, the judgment rendered thereon. The office of "auditor and assessor" which was held by Snow required of him the faithful performance of all the duties which the charter required of the incumbent of that office, irrespective of the particular designation of such duties or the capacity in which he was required to perform them, and the bond which was given by him extended to all of the duties required of him by virtue of his official position, whether these duties are required of him "as auditor" or "as assessor." The finding of the court that he collected the money "as assessor" or "as *ex officio* assessor" is of the same legal import, and the finding that he "failed to perform the official duties of such office of *ex officio* assessor" is equivalent to a finding that he failed to perform that portion of the duties of the office to which he was elected and for which the bond was given.

Whether Snow was entitled to compensation for his services in the collection of taxes is a question of law, and the allegation in the answer of the defendants that he retained the moneys sued for by reason of such right did not make an issue of fact which required a special finding, but is the question to be determined upon a consideration of the entire case.

3. There was no error in excluding the evidence offered on behalf of the defendants for the purpose of showing that the plaintiff had consented that Snow might have the compensation claimed by him. It was not competent for the city to consent to a violation of its charter, nor could the acquiescence of its officers confer upon Snow a right to compensation which the charter forbids him to receive. His declaration prior to his election that he intended to claim the commission, or the fact that he had previously retained like commissions, or that some of the city officials had approved of his act or consented thereto, or that it was a matter of public notoriety, did not, as against the provisions of the charter, confer upon him a right to the commissions, nor could the plaintiff be estopped from claiming the money collected by him by reason of an erroneous interpretation of the provisions of the charter by its officials. The objection in the brief of the appellants to the action of the court in striking out the portion of the

answer of Snow relative to this issue evidently results from an inadvertence of the record. Although the court did at an early stage of the case, upon motion of the plaintiff, strike this clause out, it afterwards, before the trial of the cause, vacated this order.

4. The finding that Snow had failed to pay into the treasury the amount for which the judgment was given is sustained by the evidence. The amount which he collected was shown, and the amount which he paid into the treasury during the term of his office was also shown. There was no allegation on the part of the defendants, or evidence in their behalf, that any further amount had been paid. The fact that he collected this amount of money in excess of the amount paid in by him sustained the finding that he appropriated it to his own use.

5. The finding that the bond was executed and delivered to the plaintiff was fully sustained by the evidence and the admission in the pleadings. Snow in his answer admits that he and the surety company executed it, and the surety company in its answer admits that Snow as principal and it as surety made and signed a certain bond, and that Snow took the bond away. It does not set forth the character or form of this bond, but, upon the ground that it has no information or belief upon the subject, denies that the bond set forth in the complaint correctly sets forth the bond signed by it and Snow, but does not allege wherein it is incorrect. Its averment in this respect is equivalent to an admission of the execution of a bond in all respects according with that set forth in the complaint, except the omission or misspelling of some immaterial word. Upon these same grounds it denies the delivery of the bond to the city by Snow. The inability of the plaintiff to produce the bond at the trial and its loss were clearly shown. Snow testified that he signed an official bond for that year with the other defendant as surety. Mr. Thomas, who was mayor, testified that Snow gave him the bond in question, and that he gave it to the city clerk, by whom it was copied into the register of official bonds. This copy was introduced in evidence. To this testimony must be added the presumption that official duty has been regularly performed. The bond was a valid obligation of the defendants without any approval by the mayor or city attorney.

We advise that the judgment and order denying a new trial be affirmed.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

Shaw, J., Angellotti, J., Van Dyke, J.

[S. F. No. 3071. Department One.—November 22, 1904.]

D. A. CURTIN, Appellant, v. H. J. KOWALSKY, Respondent.

ACTION UPON JUDGMENT BY ASSIGNEE—PLEADING—OWNERSHIP—LEGAL

CONCLUSION.—In an action upon a judgment by an assignee thereof, where the complaint alleges an assignment of the judgment, and also alleges that plaintiff is now the owner and holder of the judgment, the latter allegation is of a mere legal conclusion or presumption from the fact of assignment, and is unnecessary; and an answer denying each allegation presents an issue only as to the fact of the assignment.

1a.—PROOF OF ASSIGNMENT—GENERAL DESCRIPTION.—An assignment by the judgment creditor to the plaintiff of each and every judgment entered of record in his name carries the judgment sued upon, which was entered in his favor prior to the assignment, in the absence of evidence of any previous assignment or transfer thereof. Such assignment was admissible in evidence upon proof of its execution.

1b.—EFFECT OF PRIOR ASSIGNMENT—EXECUTED CONTRACT—CONSIDERATION—SUBSEQUENT ASSIGNMENT—EVIDENCE.—The prior assignment to the plaintiff carried the legal title to the judgment with the right to sue thereon, whether it was or was not supported by a consideration. It was an executed contract, and there could be no revocation or subsequent assignment thereof which could affect the legal title of the plaintiff. All evidence to show that plaintiff's assignment was not for value, and that the subsequent assignment was for a valuable consideration, was irrelevant and immaterial.

1c.—ASSIGNMENT IN TRUST—EQUITABLE RIGHTS OF SECOND ASSIGNEE NOT INVOLVED.—Although the assignment to the plaintiff was in trust for the assignor, and the assignor could convey his equitable interest therein, yet where the only issue was as to the fact of the assignment, without any plea in abatement, the rights of the second assignee cannot be adjudged, and the plaintiff may maintain the

action upon his legal title. The second assignee, though a *bona fide* purchaser for value, did not acquire a title superior to that of the plaintiff as prior legal assignee.

12.—NOTICE OF ASSIGNMENT—RULE OF CAVEAT EMPTOR.—It was not necessary for the plaintiff to put his assignment on file or to give notice of it to other persons who might be about to take a second assignment. The rule of *caveat emptor* applies in such case; and if the assignor has no legal title, the subsequent assignee will take none, whether he has notice or not.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a new trial. S. K. Dougherty, Judge presiding.

The facts are stated in the opinion of the court.

Vincent Neale, for Appellant.

T. J. Crowley, for Respondent.

SHAW J.—The plaintiff appeals from an order granting defendant's motion for a new trial.

The action is to recover the sum due upon a money judgment. The complaint alleges that on January 4, 1894, one Joseph E. Shain recovered judgment in the superior court of the city and county of San Francisco against the defendant for a sum of money stated; that the judgment was duly entered on January 4, 1895; that on August 15, 1895, said Shain assigned the judgment to plaintiff, and that it has not been paid, either in whole or in part. The action was begun on December 20, 1899, nearly five years after the entry of the judgment. The answer denies that Shain at the time alleged, or at all, assigned the judgment to the plaintiff. This was the only issue presented for trial. The complaint further avers that the plaintiff "is now the owner and holder" of the judgment, and this is denied by the answer. But it was not necessary for the complaint to state that the plaintiff was the owner or holder of the judgment. Such ownership and holding was the legal result of the assignment, and that fact having been alleged, it follows as a matter of law that plaintiff thereby became the owner and holder thereof. This condition of ownership is presumed to continue, and it was not necessary to allege that plaintiff

was the owner at the time the action was begun. Such an allegation, or its equivalent, is required in actions to recover the possession of specific property, but not in actions to recover on money demands. (*Pryce v. Jordan*, 69 Cal. 571; *Poorman v. Mills*, 35 Cal. 121;¹ *Wedderspoon v. Rogers*, 32 Cal. 572; *Hook v. White*, 36 Cal. 302; *Monroe v. Fohl*, 72 Cal. 570; *Clemens v. Luce*, 101 Cal. 436.)

We think the court erred in granting the motion for a new trial. The plaintiff, upon due proof of its execution introduced in evidence a contract of assignment bearing date August —, 1895, whereby the original judgment creditor, Joseph E. Shain, "sold, assigned, transferred, and set over," to the plaintiff all the right, title, and interest of Joseph E. Shain "in each and every judgment standing of record in his name." It being admitted by the pleadings that the judgment sued on was given and entered in favor of Joseph E. Shain as alleged, and there being no evidence of any previous assignment or transfer, it necessarily stood of record in his name in August, 1895. It therefore came within the description contained in the contract of assignment, and it follows that the title to the judgment was thereby assigned and transferred to the plaintiff. On the issue presented, this evidence was sufficient to support the finding and judgment.

The defendant introduced evidence to prove that after the assignment to the plaintiff, Shain had for a valuable consideration executed another assignment, purporting to transfer the judgment to H. S. Shain, who had in turn assigned it to R. T. Harding, also for a valuable consideration, and that there was no consideration for the assignment of the judgment by Shain to plaintiff other than an agreement that plaintiff was to hold and manage this and other judgments as trustee for Shain for certain purposes. The plaintiff did not admit that the assignment to him was not for a valuable consideration, and he introduced some evidence to the contrary.

In considering the relevancy and materiality of this evidence, it is to be observed that the defendant presented no issue, except as to the fact of the assignment; that he did not plead in abatement that another action was pending against him by the other claimant, nor present a cross-complaint ask-

¹ 95 Am. Dec. 90.

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ing that the other claimant be required to interplead, nor did he ask that the other claimant be made a party; and he does not claim that he has paid any part of the judgment to any person. The rights of the second assignee are not involved and cannot be adjudged. The simple questions of law are presented whether or not a consideration is necessary to support an assignment, and whether or not such an assignment, if without a valuable consideration, can be revoked, or is annulled by a subsequent assignment to another.

Prior to the adoption of the codes it was held that, inasmuch as a judgment was not assignable at common law, the effect of such assignment was to transfer an equitable title only, but that such title vested in the assignee all the beneficial interest in the judgment, and gave him the right to enforce it by process in the name of the judgment plaintiff. (*Wright v. Levy*, 12 Cal. 262-263.) It was said to be property, however, which could be purchased, the same as any other species of property. (*Ibid.*) Under the code there is no limitation upon the power to assign choses in action, including judgments, and it is clear from its provisions that such an assignment carries the legal title to the judgment, and that the transfer of the title does not depend upon the fact of there being a valuable consideration. It is provided that "Property of any kind may be transferred, except as otherwise provided by this article" (Civ. Code, sec. 1044), and the only exception made in the article is that of a possibility not coupled with an interest. A judgment is therefore property which can be transferred. A transfer is declared to be "an act of the parties, or of the law, by which the title to property is conveyed from one living person to another." (Civ. Code, sec. 1039.) It is further provided that "A voluntary transfer is an executed contract, subject to all the rules of law concerning contracts in general; except that a consideration is not necessary to its validity" (Civ. Code, sec. 1040), and that "A transfer vests in the transferee all the actual title to the thing transferred which the transferrer then has" (Civ. Code, sec. 1083), and also all of its incidents. (Civ. Code, sec. 1084.)

The effect of these rules as applied to the facts of this case is that the assignment vested in the plaintiff all of the title of Joseph E. Shain to the judgment. Nothing remained in

him which could be the subject of a subsequent assignment, excepting such equitable interest, if any, as he might have by reason of any trust that may have existed in his favor. The subsequent assignment would carry such equitable interest, if there was any; otherwise, it would be ineffectual. But the question whether or not there was any such equitable interest or trust could not be litigated in this action under the denial of the fact of assignment, if indeed it could be litigated at all in the name of the defendant. The plaintiff had the legal right to sue for the amount due upon the judgment, although he held the title as trustee. He held the legal title, and was the real party in interest, so far as the defendant was concerned.

It was not necessary for the plaintiff to put his assignment on file, or to give notice of it to other persons who might be about to take a second assignment. The other claimant, although a *bona fide* purchaser for value, did not acquire a title superior to that of the plaintiff. With respect to judgments this court has said: "The rule of *caveat emptor*—so far as any interest acquired as against third parties is concerned—applies to them in the same manner as in the purchase of any other personal property. If the assignor has no title, they will take none, whether they have notice or not." (*Mitchell v. Hockett*, 25 Cal. 544.¹ See, also, *Southard v. McBrown*, 63 Cal. 545; *Fore v. Manlove*, 18 Cal. 437.) The title having passed from Shain to the plaintiff by the assignment, it being an executed contract, there could be no revocation or retransfer effected by the act of Shain alone. His subsequent purported transfer of the same judgment did not affect the title of the plaintiff.

It follows that all the testimony relative to the want of consideration and the subsequent transfer was irrelevant and immaterial. There were some errors assigned in the statement on motion for new trial upon rulings of the court adverse to the defendant with respect to this evidence. As we have reached the conclusion that this entire inquiry was immaterial and irrelevant to the issue as to the fact of the assignment, it will not be necessary to consider these alleged errors, for they could not, in any event, be sufficient to justify the granting of a new trial.

¹ 86 Am. Dec. 151.

The only other error assigned was the action of the court in overruling an objection to the introduction of the assignment to the plaintiff. The ground of the objection was, that it was immaterial and incompetent, that no foundation had been laid, and that no particular judgment was described. There was sufficient proof of its execution, it was manifestly material and competent, and the want of a specific description was supplied by the admitted facts which showed that it came within the terms of the general description. There was no error in the ruling on the objection. We find no ground upon which to support a motion for a new trial.

The order granting a new trial is reversed.

Angellotti, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[S. F. No. 3213. In Bank.—November 23, 1904.]

**MERCED BANK, and SOPHIE A. IVETT, Appellants, v.
JAMES D. PRICE et al., Respondents.**

ACTION TO FORECLOSE MORTGAGE—DEFENSE NOT GOING TO MERITS—DISMISSAL FOR WANT OF PROSECUTION—ABUSE OF DISCRETION—ASSIGNMENT BY PLAINTIFF.—In an action to foreclose a mortgage, where the answer made no defense to the merits, but merely questioned the amount of attorney's fees, and pleaded an assignment of the cause of action by the plaintiff before suit, it was an abuse of discretion to dismiss the cause for want of prosecution on motion of the defendants where it appeared that the defendants made no effort to have the case set down for trial, and that the assignment was at first by way of pledge, and was not made absolute until several months before notice of the motion to dismiss, and that diligent efforts were made on behalf of plaintiff and the assignee to settle the suit.

ID.—BURDEN OF PROOF UPON DEFENDANTS.—The burden of proving the matters in avoidance pleaded by the defendants was upon them.

ID.—AFFIRMATIVE SHOWING NOT CONTESTED—APPLICATION BY ASSIGNEE.—Where at the hearing of the motion to dismiss there was an affirmative showing on the part of the plaintiff, which was not controverted, that the action was properly brought and continued up to that time, and that an application was made by the assignee

who had become the absolute owner of the note and mortgage, for a substitution as party plaintiff, and that the action proceed to trial, such application should have been granted, and the action allowed to proceed as requested.

APPEAL from a judgment of the Superior Court of Mariposa County. John M. Corcoran, Judge.

The facts are stated in the opinion of the court.

J. W. Knox, and F. H. Gould, for Appellants.

The respondents having sought no trial upon the issues raised by the answer, and having promised to settle, their motion to dismiss for want of prosecution should not have been granted. (*Cowell v. Stuart*, 69 Cal. 525; *McCarthy v. Hancock*, 6 How. Pr. 28; *Moeller v. Bailey*, 14 How. Pr. 359; *Dixon v. Rutherford*, 26 Ga. 153; *Doyle v. O'Farrell*, 5 Robt. 640; *Bierne v. Wadsworth*, 36 Fed. 614; *Perkins v. Butler*, 42 How. Pr. 102; *Person v. Nevitt*, 32 Miss. 180.)

J. F. McSwain, and James F. Peck, for Respondents.

The court was within its discretion in granting the motion to dismiss for want of prosecution. (*Kreiss v. Hotaling*, 99 Cal. 383; *People v. Jefferds*, 126 Cal. 296; *First National Bank v. Mason*, 115 Cal. 626; *Martin v. San Francisco*, 131 Cal. 576; *Grigsby v. Napa County*, 36 Cal. 588;¹ *Clavey v. Lord*, 87 Cal. 419.)

VAN DYKE, J.—This is an appeal from the judgment dismissing the action upon the application of the defendants. The ground upon which the dismissal was made, as stated in the notice of motion, and also in the order of the court granting the same, was, that the plaintiff Merced Bank had neglected to prosecute the same with diligence, and that it had abandoned said cause. The action is upon a promissory note and to foreclose a mortgage securing the same. The note was executed by defendants James D. Price, Jeff D. Price, Thomas Price and George Price, in the sum of sixty-five hundred dollars, and made payable to the Merced Bank or order, and the mortgage to secure the same was executed by the makers of the note, and in addition thereto Nettie L. Price and

¹ 95 Am. Dec. 212.

Mary Wilson, also part owners of the real estate covered by the mortgage. The complaint in the action was filed September 30, 1898, and summons thereon issued and returned within a year, and all the defendants answered September 25, 1899. June 8, 1900, by stipulation of all parties, the complaint was amended as to the description of the property embraced in the mortgage, and it was also stipulated that the answer of defendants to the original complaint might stand as an answer to the amended complaint. This stipulation was filed and an order made accordingly June 11, 1900. The notice of motion to dismiss for failure to prosecute was made and filed July 26, 1901. Monday, August 12th, was noticed as the day set for hearing said motion, and in the mean time, on August 7th, a stipulation was prepared on the part of plaintiff's attorney, who was also the attorney of Sophie A. Ivett, who was then the owner and holder of the note and mortgage, to have said Ivett substituted in place of the original plaintiff, and to allow the action to proceed in her name, and that the said action might be tried on September 3d following, or as soon thereafter as counsel and the court could hear the same. Defendants' attorneys declined to sign this stipulation. The hearing of the motion to dismiss, however, was continued until October 1st. On the hearing J. W. Knox submitted his affidavit on behalf of the Merced Bank and Sophie A. Ivett. In his affidavit it is set forth that the note and mortgage were pledged by said bank to Sophie A. Ivett as collateral security for certain moneys due from said bank to her, which said pledge was in writing, but not recorded; that said note and mortgage remained so pledged until October 2, 1900, at which time, upon full settlement between said bank and said Sophie A. Ivett, and as part payment of the sum then due her from said bank, the bank sold, assigned, and transferred absolutely to her the said note and mortgage in suit, and that the same had then become the property of said Sophie A. Ivett. He further states in said affidavit that after the answer of the defendants was filed negotiations were entered into between the parties to the action for settlement of the same, which continued off and on until October 2, 1900, and that by reason of the fact that the said note and mortgage sued on were pledged to said Sophie A. Ivett, it became necessary on the part of the original plaintiff

to get her consent to a settlement of said suit for any less sum than the full amount due on said note and mortgage. It is further stated in said affidavit that the defendants never at any time asked that said action be set down for trial or attempted to have said action set down for trial. The affidavit of said Sophie A. Ivett was also filed on said hearing. In this affidavit the affiant states that she has been anxious at all times since October 2, 1900, to have said suit compromised, settled, or tried and disposed of, and has used every reasonable effort in her power to accomplish the same without sacrificing her rights in the matter, and is now anxious to have the said suit tried and disposed of at once, and hereby asks that an order be made by this court allowing said suit to continue in the name of the plaintiff for the use and benefit of said affiant, Sophie A. Ivett, she now being the owner and holder of the note and mortgage sued on in said action, or that said Sophie A. Ivett may be substituted as plaintiff in said action; and that prior to said October 2, 1900, she simply held said note and mortgage as a pledge.

The facts set forth in these affidavits with reference to the assignment of the note and mortgage by the Merced Bank by way of pledge merely in the first instance, and that the same were not assigned absolutely until a short time before the motion on the part of the defendants to dismiss the action, are not controverted on the part of the defendants. It is claimed, however, by defendants' counsel that these facts merely raise an issue with the answer filed by defendants, and it is contended that such issue raised by the pleadings cannot be tried upon affidavits. The answer, however, entirely fails to raise any issue in reference to the merits of the action. It does not deny the execution of the note and mortgage or aver payment thereof, or question the amount alleged to be due thereon as set forth in the complaint. It merely denies that the amount claimed as attorney's fee is a reasonable sum to be allowed, but alleges, on the contrary, that a hundred dollars is a sufficient sum to be allowed as attorney's fee. It also avers that before the action was brought the plaintiff Merced Bank had assigned and delivered the note and mortgage to one S. A. Ivett as administrator of the estate of J. L. Ivett, deceased, and alleges that certain probate proceedings in said estate resulted in vesting the absolute

ownership of the note and mortgage in said S. A. Ivett. It further avers that prior to the filing of the complaint the note and mortgage had been indorsed, assigned, and transferred to the Bank of British Columbia, and that thereafter the same had been assigned and transferred to S. A. Ivett. None of the material allegations of the complaint having been controverted by the answer, for the purpose of the action, they are deemed to be true, and the allegations in reference to the assignment are in the nature of new matter in avoidance of the action, and are deemed controverted by the opposite party. (Code Civ. Proc., sec. 462.) The burden of proving these matters in avoidance, therefore, was on the defendants. At the hearing of the motion to dismiss there was an affirmative showing on the part of the plaintiff, which was not controverted, that the action was properly brought and continued up to that time, and that upon the application of Sophie A. Ivett, who had become the absolute owner of the note and mortgage, a substitution of the party plaintiff should have been granted and the action allowed to proceed as requested.

The order dismissing the action was based solely upon the ground of failure to prosecute, and not for any of the causes enumerated in the code. Nor could it well have been, as the service and return and appearance of the defendants, and other proceedings, were all within the time required by the code. Conceding the power of the court in a proper case to dismiss a cause for laches, there was an abuse of discretion in the case at bar in exercising that power in favor of these defendants, who, as shown, had no defense whatever to the action upon the merits. (*Herman v. Pacific Jute Mfg. Co.*, 131 Cal. 210.)

The judgment appealed from is reversed and the cause remanded, with directions to the court below to proceed in the case as herein suggested.

Shaw, J., Angellotti, J., Lorigan, J., Henshaw, J., and McFarland, J., concurred.

[S. F. No. 2988. Department One.—November 25, 1904.]

**SAMUEL W. ELLIOTT, Respondent, v. SOUTHERN
PACIFIC COMPANY, Appellant.**

RAILROADS—LIMITED TICKET—RETURN TRIP—BREACH OF CONTRACT—

EXPIRATION OF TICKET—EXPULSION OF PASSENGER.—Where the holder of a limited round-trip railroad ticket was prevented from making the return trip within the time limited, owing to a railroad strike, but did not attempt to use the return ticket immediately after the strike was ended, nor within an extension of time granted for six days thereafter, but made his return trip by other means, his only remedy was for damages for breach of the contract, and he could not use the return ticket after the expiration of the time limited by the ticket and by the extension granted; and where he presented no other ticket, and refused to pay his fare, he was properly expelled from the train.

ID.—RETENTION OF LIMITED TICKET BY CONDUCTOR.—The fact that the conductor improperly retained the limited ticket after it had become void, and refused to return it to the plaintiff upon his demand for such return, could not give the plaintiff any right to remain on the train without the presentation of a valid ticket or the payment of fare, and without any offer to pay fare in the event of the return of the ticket. [Beatty, C. J., dissenting for reasons expressed.]

ID.—STATEMENT BY ANOTHER TICKET AGENT AFTER SALE OF LIMITED TICKET—WAIVER NOT SHOWN.—A mere statement by another ticket agent, who did not sell the ticket, made at the return point ten days after its sale, that the ticket would be good when the trains start, could not operate as a waiver of the stipulation as to time in the absence of proof of his authority to make such waiver, even if the language used could be construed as a waiver.

ID.—UNSUPPORTED FINDINGS.—*Held*, that findings that the time of use of the return ticket was reasonable, and was the first opportunity for its use, and that plaintiff would not have purchased the ticket had he known of the strike, and that in selling the ticket the railroad company committed a fraud upon the plaintiff, and that plaintiff's consent to the contract was induced by fraudulent concealment, are unsupported by the evidence.

ID.—RIGHTS OF PARTIES TO LIMITED TICKET—INABILITY OF PERFORMANCE—COMPLETION OF JOURNEY—FIRST OPPORTUNITY.—The rights of the parties to a limited ticket are ordinarily limited by the terms of the contract; but in case of inability on the part of the railroad company rendering the strict performance of the contract unreasonable, the passenger, if he avails himself of the first opportunity to complete his journey, may so complete it under the contract, although the time limited has expired.

ID.—FIRST OCCASION OF USE NO CRITERION OF FIRST OPPORTUNITY.—

The fact that the plaintiff did not have occasion to use the return ticket for one month after train service was resumed is no criterion as to what was a reasonable time or the first opportunity.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. John Ellsworth, Judge.

The facts are stated in the opinion of the court.

A. A. Moore, for Appellant.

The plaintiff could not recover, having no rights under the limited ticket after its expiration, and having tendered no other ticket or fare. (1 Fetter on Carriers, pp. 731, 737, and cases cited; *Russell v. Missouri etc. Ry. Co.*, 12 Tex. Civ. App. 627; *Moore v. Ohio River R. R. Co.*, 41 W. Va. 160; *Pennington v. Philadelphia etc. R. R. Co.*, 62 Md. 95; *Poulin v. Canadian Pac. Ry. Co.*, 52 Fed. 197; *Western Maryland Ry. Co. v. Stocksdale*, 83 Md. 245, and cases cited; *Pennsylvania R. R. Co. v. Price*, 96 Pa. St. 256; *Boston etc. R. R. Co. v. Proctor*, 83 Mass. (1 Allen) 267;¹ *Hill v. Syracuse etc. R. R. Co.*, 63 N. Y. 101; *Texas etc. R. R. Co. v. McDonald*, 2 Wilson Civ. Cas. Ct. App. (Tex.) 163; *Grogan v. Chesapeake etc. Ry. Co.*, 39 W. Va. 415; *Gulf etc. Ry. Co. v. Looney*, 85 Tex. 158;² *Pennsylvania Co. v. Hine*, 41 Ohio St. 276.) The fact that the void limited ticket was not returned by the conductor on demand does not affect the right of the plaintiff to ride without paying his fare. (*Townsend v. New York Central etc. R. R. Co.*, 56 N. Y. 295;³ *Rahilly v. St. Paul etc. Ry. Co.*, 66 Minn. 153.) The sole effect of the failure by defendant to comply with its contract for the return trip was to give to plaintiff a cause of action for breach of contract. (*Taylor v. Nassau Electrical Ry. Co.*, 32 App. Div. 486, 53 N. Y. Supp. 5; *Townsend v. New York Central etc. R. R. Co.*, 56 N. Y. 295.³)

George Lezinsky, for Respondent.

The defendant being unable to fulfill its contract, plaintiff had the right to demand performance within a reasonable

¹ 69 Am. Dec. 729.

² 15 Am. Rep. 419.

³ 34 Am. St. Rep. 787.

time. (*Auerbach v. New York Central etc. R. R. Co.*, 60 How. Pr. 382; *Gulf etc. R. R. Co. v. Wright*, (Tex. Civ. App.) 30 S. W. 294; *Little Rock etc. R. R. Co. v. Dean*, 43 Ark. 530.¹) The statement of the ticket agent bound the defendant. (*Nelson v. Long Island R. R. Co.*, 7 Hun, 142.) The plaintiff had the right to ride until the ticket was returned to him upon demand. (*Gulf etc. R. R. Co. v. Copeland*, 17 Tex. Civ. App. 55; *Vankirk v. Pennsylvania R. R. Co.*, 76 Pa. St. 66;² *Bland v. Southern Pacific R. R. Co.*, 55 Cal. 573.³) The scope and extent of the ticket was governed by the facts and circumstances surrounding it. (*Northern Pacific R. R. Co. v. Pauson*, 70 Fed. 585; *New York etc. R. R. Co. v. Winton*, 143 U. S. 60.)

ANGELLOTTI, J.—Defendant appeals from a judgment rendered in favor of plaintiff for the sum of seven hundred dollars, and from an order denying its motion for new trial. The action was for damages alleged to have been suffered by plaintiff by reason of his alleged wrongful and forcible expulsion from a train of defendant on August 13, 1894, on which train, it was alleged, the plaintiff was a passenger.

The case was tried without a jury. The record shows the following facts: On August 13, 1894, the plaintiff boarded defendant's train at the Oakland pier, Alameda County, for the purpose of being transported thereon to Pleasanton, in the same county. He presented to the conductor for his passage on such train a round-trip ticket "From Pleasanton to San Fran. and return," which he had purchased from defendant's ticket agent at Pleasanton on July 3, 1894, at a reduced rate,—to wit, one fare for the round trip, viz., \$1.10,—and which he had used on July 3d in traveling from Pleasanton to San Francisco. This ticket was distinctly marked upon its face "Void after July 6, 1894," and this limitation and the fact that the ticket was sold at a reduced rate were known to plaintiff at the time he purchased the ticket.

The conductor at once handed the ticket back to plaintiff, informing him that it was no good—that it had expired. The

¹ 51 Am. Rep. 584.

² 36 Am. Rep. 50.

³ 18 Am. Rep. 404.

plaintiff told the conductor that he thought he was entitled to ride on it, that he had bought and paid for it, and that it was no fault of his that he had not ridden on it. The conductor then left the plaintiff, but returning presently, said: "Let me see that ticket," and upon plaintiff handing it to him, said, "That is no good," and put it in his pocket. He further said, "You will either have to pay your fare or get off the train at San Leandro." Plaintiff said, "Then give me back my ticket." The conductor said, "Well, I will look out for that ticket." When near San Leandro, he returned and said, "Now, you will have to get off here or pay your fare." The plaintiff said, "I don't propose to do either till you give me back my ticket." The conductor said, "I will take care of the ticket; you will have to get off the car." The plaintiff said, "I don't propose to do either." The conductor said, "I will put you off," and plaintiff said, "Bring your crowd." The foregoing statement as to what took place on the train is from plaintiff's testimony, and is as favorable to him as any of the evidence given.

The plaintiff forcibly resisted all attempts to eject him, and was by means of force ejected by defendant's servants from the train, but no more force or violence was used than was reasonably necessary to effect the ejection. "Neither his [plaintiff's] bodily suffering nor his mental suffering were very great nor were his bodily injuries serious."

The foregoing statement of facts is in accord with the findings of the court, except in so far as certain findings may be capable of being construed as showing that the conductor received the ticket as in any degree entitling plaintiff to travel, or without notifying plaintiff that it was of no value and that he could not honor it, or that plaintiff intimated in any way that he would pay his fare or present a valid ticket if the other ticket should be returned. In so far as the findings may intimate any of these things, they are not supported by the evidence, as is fully shown by plaintiff's testimony on this subject, which has already been stated. The case in this respect is simply one where the conductor repudiated as absolutely void, and expressly refused to honor for passage, a ticket that was absolutely void, but after so expressly refusing to honor it nevertheless took it into his possession and retained it.

It was further found by the court substantially as follows:—

From July 5, 1894, to July 13, 1894, defendant, notwithstanding its desire and attempts to operate its passenger-trains between Oakland pier and Pleasanton, was absolutely prevented from doing so by the forcible violence of a large body of men, the trouble having been caused by a "strike" of "engine firemen in its employ." On July 5 and 6, 1894, it did not operate any of its ferry-boats between San Francisco and Oakland pier. It did, however, operate a ferry-boat between San Francisco and a place in Oakland near a station on the railroad from Oakland pier to Pleasanton. On both days the plaintiff went to the proper place in San Francisco for the purpose of taking passage, and learned that defendant was not operating its boats or trains. He, however, on July 6th took passage on the ferry-boat running to Oakland, using his ticket for that purpose, and, having arrived at the landing place in Oakland, proceeded upon his journey to Pleasanton, where he arrived the same day, walking a part of the way, and riding the remainder of the way upon conveyances not operated by the defendant.

Train service was resumed on July 13, 1894, and defendant, by its order to its conductors, extended the time within which plaintiff and others similarly situated might use tickets of like character for return passage about six days, which period elapsed in the month of July, 1894, but the fact of such extension was not communicated to plaintiff.

The court further found that such period of extension was not a reasonable period; that the first opportunity that plaintiff had of using said ticket for transportation between Oakland pier and Pleasanton was on August 13, 1894, and that this was a reasonable time within which to use the same. These findings are attacked as not being sustained by the evidence, and the attack is, in our opinion, well founded. Six days was twice the original life of the ticket, and certainly much more than sufficient to enable one who had come from Pleasanton to San Francisco upon such a ticket, to make his return journey. August 13th was not the first opportunity that plaintiff had of using said ticket, for the train service had been resumed on July 13th and continued uninterrupted thereafter. The only basis for a finding that August 13th was the date of plaintiff's first opportunity to use the ticket is

the evidence of plaintiff that after July 6th he was not again in San Francisco or Oakland until August 13th; in other words, that he did not again have occasion to go from San Francisco or Oakland to Pleasanton until that time. This cannot, in a case of this character, be the criterion as to what was a reasonable time or the first opportunity.

The court further found that at the time defendant sold the ticket to plaintiff it knew, or had good and sufficient reason to know, from facts and circumstances then existing and within its knowledge, that it would be or might be unable to transport plaintiff upon said railroad on July 5th or 6th, that it did not communicate these facts and circumstances to plaintiff, that plaintiff did not know thereof, and that if he had known thereof he would not have purchased the ticket. There is absolutely no evidence to sustain the finding embraced in the last clause.

The court also found that in selling the ticket under such circumstances the defendant committed a fraud upon plaintiff.

The plaintiff testified that on July 5th, when, at San Francisco, he found that the trains were not being operated, he asked a man who was stationed at the ticket-window of defendant to give him his money back. The man told him that his ticket was good until the next day, and in response to plaintiff's inquiry as to what would happen if the trains were not then running, said: "It will be good when they do start."

It further appears that on August 13th, plaintiff, in San Francisco, purchased a ticket from San Francisco to Pleasanton, which, however, he never showed or offered to the conductor.

The foregoing statement presents all the facts necessary to a discussion of the legal questions involved.

There can be no question as to the right of a railroad company to limit the time within which a ticket sold at reduced rates may be used. As has been said, the passenger, by accepting and using such a ticket, makes a contract with the company according to the terms stated, and the reduction in the fare is the consideration for the contract. The passenger cannot take advantage of the reduction of the rate, and reject the terms on which alone the reduction was made. (See 1 Fetter on Carriers of Passengers, secs. 285, 289; 4 Elliott on

Railroads, sec. 1598, and cases cited therein.) Plaintiff's counsel, recognizing this now well-settled doctrine, admitted on the trial that defendant had a right to limit the ticket, that, under ordinary circumstances, the ticket in question would have expired on July 6th, and that if on July 5th and 6th, defendant had been ready to carry the plaintiff, he would have had no rights under the ticket, if he had failed to avail himself of the opportunity to be transported according to its terms.

It is, however, contended that the inability and failure of the defendant to perform its contract of carriage within the time limited, extended the time and gave to the plaintiff the right to *demand performance* "at a reasonable subsequent time"; and also that the limitation was void by reason of fraudulent concealment by defendant of facts and circumstances which it knew or ought to have known at the time of the making of the contract, and which it failed to communicate to plaintiff, and that therefore plaintiff was entitled to use the ticket within a reasonable time, "the same as if no such limitation was set upon the ticket at all."

We know of no principle of law or decision of any court that would warrant the application of these suggested rules to the circumstances of this case. The contract on the part of defendant railroad company was that it would, in consideration of the \$1.10 paid, not only carry the holder of the ticket from Pleasanton to San Francisco, but also carry him back from San Francisco to Pleasanton, *on any day not later than July 6th*.

Under its terms the holder was entitled to be transported by the railroad company when he presented himself for passage on July 6th, the last day of the life of the ticket. The company failed to perform the obligation imposed on it by the contract, and it may well be that this failure on the part of the company constituted a breach of contract on its part, and that it became liable to the holder of the ticket for all damages proximately caused by such breach of contract. Defendant being unable to perform its contract, the holder of the ticket thereupon made his return trip to Pleasanton without the aid of the company and by other means. He thus completed his journey and measured his damage. Whatever damages were caused by the failure of the railroad company

to carry him back on or before that day had then accrued, and his cause of action against the company, by reason of the breach of contract, was then complete. It had failed to perform its contract to transport him from San Francisco to Pleasanton; and could not thereafter perform it according to its terms.

The railroad company had never undertaken to carry him on any other journey than that for which the contract was expressly made, and no such liability could be imposed upon it in the face of its express contract to the contrary. The plaintiff could not, because of the failure of the railroad company to perform its contract, make a new contract for the company. This was not his remedy for the breach of contract. The law gave him full and adequate remedy by way of action for damages for such breach, and this, under the circumstances of this case, was his sole and exclusive remedy.

In this connection, it would seem entirely immaterial whether or not there was any fraudulent concealment by the company, at the time of the making of the contract, of facts from which it might be inferred that it might not be able to fully perform the contract according to its terms. Such concealment could not operate to make a new contract between the parties. For it, if it existed, the law gave plaintiff certain remedies, but the making of a new and different contract by him alone was not one of them. The record, however, does not show that plaintiff's consent to the contract was induced by any fraudulent concealment. The finding to that effect, in response to the issue made by the pleadings, finds no support whatever in the evidence. By express provision of our Civil Code, consent to a contract is deemed to have been obtained through fraud "only when it would not have been given had such cause not existed." (Sec. 1568. See, also, *Colton v. Stanford*, 82 Cal. 351, 399.¹) So the question as to the effect of fraud is entirely eliminated.

It has been frequently said, in effect, that a limitation as to the time within which the passage contracted for must be made, must, in view of all the facts and circumstances existing at the time the contract is entered into, be reasonable, and that if it be unreasonable, the passenger, availing himself of

¹ 16 Am. St. Rep. 137.

the first opportunity to *complete his journey*, may so complete it under the contract, although the time stipulated therein has expired. But the rule here suggested, we are satisfied, goes no further than above stated. Thus, in 2 Woods on Railway Law, 1403, the instances suggested to support the statement that conditions of this character must be reasonable or they will have no validity, and if impossible of performance, they are unreasonable, are, first, that if a ticket is issued from A to B and return, "good for this day only," and there is no train which leaves B on the return trip to A after the arrival of the train, the condition would be unreasonable, and the holder would be entitled to a return passage to A on the first train leaving B for A on the next day, and, second, if a ticket is issued from A to B, "good for this day only," and by some accident to the train the trip is not completed until the next day, the ticket is good for the balance of the passage. Elliott says that the limitation must be reasonable, and in the note thereto, that if the company runs no train on the day to which it is limited, or if it is a round-trip ticket and there is not time to make the round trip within the period of limitation, or if it is a through ticket over connecting lines and the time is too short to reach the last line, where there is no delay within such period, "we suppose the traveler could take the first train on the next day." (4 Elliott on Railroads, sec. 1598, and note.) Fetter says that the time limited must allow sufficient time "for a person using ordinary diligence to accomplish the trip," and quoting from *Little Rock etc. Ry. Co. v. Dean*, 43 Ark. 529,¹ a case strongly relied on by plaintiff, says: "The carrier must afford a purchaser of a limited ticket the necessary facilities for accomplishing his journey within the stipulated time, and, upon his failure to do so, he is not in position to treat the contract of carriage as forfeited, and demand a repayment of fare for the same passage, at least, if the ticket holder avail himself of the first opportunity to *complete his journey*, after the expiration of the time limited." The italics are ours. The case cited was one where the passenger having a through ticket over connecting lines, took the first train on defendant's road that left the place after his arrival therein, on a train of the connecting road.

Gulf etc. R. R. Co. v. Wright (Tex. Civ. App.) 30 S. W.

¹ 51 Am. Rep. 584.

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294, cited by plaintiff, was a case where the stipulation on the ticket was that it should be entirely used within three days after being stamped for the return trip, and the passenger, traveling diligently, failed to finish his journey within that time owing to delays in the movements of trains on the part of the railroad company, and it was held that he could *finish his journey*.

The only other case cited by plaintiff at all applicable upon this point is that of *Auerbach v. New York Central etc. R. R. Co.*, 60 How. Pr. 382, where, in deciding for the railroad company, the court said in effect that where the agreement is that one must use his ticket for a continuous passage prior to a certain date, and begins his continuous journey in time to reach his destination in the usual course of travel, but is prevented by delays occurring upon the railroad from finishing his journey in the lifetime of the ticket, he may continue his journey to its end. Although this was mere *obiter*, the court holding that the plaintiff was not entitled to recover for the reason that he did not commence his journey in time to reach his destination in the usual course of travel, within the lifetime of the ticket, it is in line with the statements heretofore mentioned as made in the text-books and the cases already cited. It may be noted that the judgment in this case was reversed by the New York court of appeals, upon the theory that the passenger did commence his journey on defendant's road in time, and that having so commenced it, he was entitled, under his contract, to pursue it continuously to the end, notwithstanding that the time expired while he was still on the train, pursuing such journey, the case, in this respect, being similar in principle to *Lundy v. Central Pacific R. R. Co.*, 66 Cal. 191.¹ (*Auerbach v. New York Central etc. R. R. Co.*, 89 N. Y. 281.²) However, there is nothing in the opinion in *Auerbach v. New York Central etc. R. R. Co.*, 60 How. Pr. 382, or in the other cases cited by plaintiff, or in the views of the text-book writers, or in the cases cited in the text-books, as to unreasonable limitations as to time, that supports the position to which plaintiff is forced by the circumstances of this case,—viz., that because the railroad company failed through its own fault or inability to transport him upon his return journey, and he was thereby

¹ 56 Am. Rep. 100.

² 42 Am. Rep. 290.

put to the trouble and inconvenience and expense of returning without its aid and by other means, and he did so return, he may enforce a passage under the original contract upon another journey taken by him at a subsequent time, and after the expiration of the time specified in the contract, provided he does so within, as plaintiff says, "a reasonable time."

There is a plain distinction between the case where the passenger seeking diligently to pursue his journey to its end is prevented from so doing within the stipulated time by reason of the fact that the time allowed was too short to admit of the accomplishment of the trip, or by some fault or inability of the railroad company, and takes advantage of the first opportunity afforded by the company to complete such journey, and such a case as is here presented. In the former case the passenger is diligently proceeding under his original contract, availing himself of all the means offered by the railroad company to complete his journey, and the limitation as to time is ineffectual against him only to such an extent as is necessary to enable him to reach his journey's end. In this case the plaintiff was not proceeding under the original contract at all, but was simply seeking by reason of defendant's breach of such contract, to enforce a passage upon a subsequent and distinct journey, commenced long after the expiration of the time stipulated in the contract. We know of no principle of law that would warrant him in so doing.

There is nothing in the suggestion that the statement of defendant's employee at the San Francisco ticket-office on July 5th, in response to plaintiff's query as to what would happen if the trains were not running on July 6th, that "it will be good when they do start," operated as a waiver by the railroad company of the stipulation as to time. It will be observed that this is not a case of a statement made by an employee of the company at the time of the sale of the ticket and the making of the contract, but if the statement was made at all (there is no finding of the court upon the subject), it was made two days after the contract was entered into, and by another employee, who was not shown to have any authority to make such a waiver, even if the language used could be construed as a waiver at all.

The only case cited by plaintiff to sustain his contention

on this point is that of *Nelson v. Long Island R. R. Co.*, 7 Hun, 142, where one of the three justices participating held that the statements of the ticket agent selling the ticket were admissible for the purpose of determining what the original contract was. Such cases are, of course, not in point.

It is further contended that the defendant could not, while retaining the void ticket offered by plaintiff, legally demand the delivery of any other ticket or the payment of fare, and could not legally eject plaintiff for failure to comply with such demand.

As already stated in our discussion of the findings of the court on this subject, the conductor expressly repudiated this ticket as absolutely void, and notified the plaintiff that he could not honor it. It was as a matter of fact entirely without value.

We are not at all satisfied that the conductor had any right to retain this ticket, but we cannot see how an improper retention of a worthless ticket by the conductor could give the plaintiff any right to remain on the train without the presentation of a valid ticket or the payment of fare. He had not exhibited or surrendered a valid ticket, he had given nothing of value to the conductor, and he had refused and continued to refuse to pay his fare. The statute provides that if any passenger refuses to pay his fare, or to exhibit or surrender his ticket, when reasonably requested so to do, he may be ejected at any usual stopping-place or near any dwelling-house. (Civ. Code, secs. 487, 2188.) The conditions under which he might lawfully be ejected had thus arisen, and the improper retention of the worthless ticket could not impair the right of the railroad company to prevent him from riding without payment of fare. Upon this question the case of *Rahilly v. St. Paul etc. R. R. Co.*, 66 Minn. 153, is directly in point. The court there said: "We are all agreed that, even if the conductor had no right to take up the ticket, this would not give the plaintiff any right to refuse to pay his fare until and unless the ticket was returned. Having no right to ride on the ticket, it was his duty to pay his fare or leave the train, and then pursue his remedy against the defendant for wrongfully withholding the ticket from him."

Plaintiff cites the case of *Vankirk v. Pennsylvania R. R. Co.*,

76 Pa. St. 66,¹ which is somewhat in line with his contention on this point. The case, however, differs from this in the fact, apparently considered material by the Pennsylvania court, that the plaintiff there offered to pay his fare, provided the ticket already delivered was returned to him. The opinion there proceeded upon the theory that the conductor had no right to demand anything in addition to the accustomed fare, and the plaintiff having offered to pay this upon the return of the ticket improperly retained, the conductor's refusal to return it was a demand for something more than the accustomed fare. In the case at bar, the plaintiff did not offer to pay his fare in the event that the ticket was returned. He simply said, in effect, that he would neither pay his fare nor get off the train until the ticket was returned, and the evidence clearly shows that he intended to ride upon the worthless ticket or be ejected from the train.

The case of *Bland v. Southern Pacific Co.*, 55 Cal. 570,² cited by plaintiff, is clearly not in point. There a passenger from San Jose for San Francisco, who had failed to purchase a ticket, gave to the conductor, when the train was about four miles out of San Jose, two dollars, which was the regular ticket price to San Francisco. The conductor put this in his pocket, and then demanded twenty cents additional, the extra amount due for fare to San Francisco when a passenger failed to procure his ticket at the station. The passenger refused to pay this, and the conductor then and there stopped the train, and, although the plaintiff then offered to pay the twenty cents additional, ejected him, without first returning the money already paid. It was said by the court that the conductor certainly had no authority to eject the passenger and keep the money paid and received as fare, and that the stopping of the train and the actual amotion of the plaintiff were parts of a single act by which the servants of the defendant asserted a right to do that which they were not authorized to do while retaining plaintiff's money. This was clearly right, but the distinction between this case and that is obvious.

The judgment and order denying defendant's motion for a new trial are reversed.

Van Dyke, J., and Shaw, J., concurred.

¹ 18 Am. Rep. 404.

² 36 Am. Rep. 50.

A rehearing was denied December 24, 1904, on which Chief Justice Beatty delivered the following dissenting opinion:—

BEATTY, C. J.—I dissent from the order denying a rehearing of this case. I think the case of *Bland v. Southern Pacific Co.*, 55 Cal. 570,¹ is very clearly in point. The circumstances were different, but the cases cannot be distinguished in principle. The ticket which the conductor took and retained was the property of the plaintiff and had a legal value,—it was evidence of a broken contract,—and on the principle of the *Bland* case the conductor had no right to eject the plaintiff without first returning the ticket. This is said, of course, upon the assumption that the plaintiff's account of the transaction was true. It was contradicted by the conductor, but here we must accept the evidence which supports the findings of the trial court.

[S. F. No. 3020. Department One.—November 25, 1904.]

HENRY GIBSON et al., Appellants, v. MANETTA HAMMANG, etc., Respondent.

ACTION TO ANNUL DEED—COSTS.—An action to annul a deed made by a testator in her lifetime to the defendant, brought by the heirs at law who were devisees under the will, is an action involving the title to the land in question, and where plaintiffs recover part of the property sued for, they are entitled to costs as a matter of right, under section 1022 of the Code of Civil Procedure.

LD.—MOTION TO AMEND DECREE.—Where the decree for the plaintiffs improperly disallowed costs to the plaintiffs, a motion may be properly made by the plaintiffs, under section 663 of the Code of Civil Procedure, to amend the conclusions of law and to vacate that part of the judgment disallowing costs, and to enter judgment for costs in their favor.

APPEAL from part of a judgment of the Superior Court of Santa Clara County disallowing costs. A. L. Rhodes, Judge.

¹ 36 Am. Rep. 50.

The facts are stated in the opinion.

W. C. Kennedy, and Will M. Beggs, for Appellants.

William A. Bowden, for Respondent.

CHIPMAN, C.—Action to annul a deed to certain lands. Plaintiffs had judgment. They appeal from that part of the judgment which denied them their costs of suit.

Respondent's contention is, that "in this class of cases the allowance of costs is a matter of discretion to be exercised by the trial court." (Citing Code Civ. Proc., sec. 1025; *Abram v. Stuart*, 96 Cal. 235; *Irvine v. Perry*, 119 Cal. 352; *Bathgate v. Irvine*, 126 Cal. 149;¹ *Senior v. Anderson*, 130 Cal. 290, and other cases.)

Appellants claim that the action involved the title or possession to real estate, and that plaintiffs were entitled to their costs as matter of right under section 1022 of the Code of Civil Procedure.

Plaintiffs and defendants are children of Sarah Gibson, now deceased, who in her lifetime (in April, 1896) conveyed certain real property situated in Los Gatos, California, and certain other real property situated in the city of Omaha, Nebraska, to defendant by two separate deeds of gift. It is alleged in the complaint, and found by the court, that at the time of these conveyances Mrs. Gibson was advanced in years and that her mental and physical powers were somewhat impaired; that she was under the care and control of defendant, who had great influence over her; and that the conveyances of said real property were upon the understanding that its purpose was to prevent any of the children of Mrs. Gibson from procuring a conveyance from her of said lands, and that the defendant should hold the title to said property for the use of her mother, and that she should reconvey to her the title whenever requested so to do, and that defendant would support her mother during her natural life. It also appeared that Mrs. Gibson died testate in April, 1897, and the plaintiffs and defendant were her heirs at law and the devisees of her will, and that her will was admitted to probate April 30, 1897; that prior to her death, and

¹ 77 Am. St. Rep. 153.

not long after making said conveyances, she demanded of defendant that she reconvey said lands to her, but defendant refused to do so. The title to the property was alleged and found to be in defendant by virtue of said conveyances, but the conclusion of law from the findings was, that "plaintiffs are entitled to judgment to the effect that the said deed of conveyance of the Los Gatos property be annulled and adjudged to be void, but without their costs of suit in this action expended." The conveyance of the Omaha property was not referred to in the judgment.

The foregoing is sufficient to illustrate the character of the action. Section 1022 of the Code of Civil Procedure provides that "Costs are allowed, of course, to the plaintiff, upon a judgment in his favor in the following cases: 1. In an action for the recovery of real property; . . . 5. In an action which involves the title or possession of real estate." In an action other than those mentioned in section 1022, costs may be allowed or not, in the discretion of the court. (Code Civ. Proc., sec. 1025.) The pleadings, findings, and judgment all go to show that the action involved the title to the land in question, and although plaintiffs recovered as to part of the land only, they were entitled to their costs as matter of right. In the recent case of *Sierra Water etc. Co. v. Wolff*, 144 Cal. 430, which was an action to quiet title, it was held that the question of costs does not depend upon the form or nature of the action,—whether legal or equitable,—but depends rather upon the fact whether the case comes within the terms of the statute relating to costs,—namely, section 1022 of the Code of Civil Procedure. It was also held that because plaintiffs in that action recovered judgment for part only of the land in controversy did not change the fact that they had judgment in their favor.

Plaintiffs moved the court under section 663 of the Code of Civil Procedure to amend the conclusions of law, and to vacate that part of the judgment disallowing their costs of suit, and to enter judgment for their costs. Such motion is authorized by the code provision, *supra*. (*Shafter v. Lacy*, 121 Cal. 574.)

It is advised that the case be remanded, with directions to set aside that part of the judgment relating to costs, to correct the conclusions of law, conforming to the foregoing

opinion, and to amend the judgment by awarding costs to plaintiffs, and, as thus amended, the judgment to stand affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the case is remanded, with directions to set aside that part of the judgment relating to costs, to correct the conclusions of law, conforming to the foregoing opinion, and to amend the judgment by awarding costs to plaintiffs, and, as thus amended, the judgment will stand affirmed.

Angellotti, J., Shaw, J., Van Dyke, J.

[S. F. No. 3096. Department One.—November 26, 1904.]

HENRY T. HOLMES, Respondent, v. JOSEPH M. WARREN, Appellant.

APPEAL—ORDER DENYING NEW TRIAL—REVIEW—DEMURRER TO COMPLAINT—SUPPORT OF JUDGMENT—FINDINGS.—Upon appeal from an order denying a new trial, the question whether the court improperly overruled a demurrer to the complaint, or whether the complaint is sufficient to support the judgment cannot be considered. Such appeal does not involve any consideration of the correctness of the judgment or of the sufficiency of the pleadings or findings to support it.

ID.—MOTION FOR NEW TRIAL—DISTINCT PROCEEDING.—A motion for a new trial is an issue of a distinct proceeding, and is to be heard upon an independent record, distinct from the record upon which the judgment depends.

ID.—MOTION FOR NONSUIT—SUFFICIENCY OF EVIDENCE—SUFFICIENCY OF COMPLAINT NOT INVOLVED.—Upon motion for a nonsuit, the only question to be considered is as to the sufficiency of the evidence to sustain the complaint; and where the court was warranted by the evidence in refusing the motion, the question whether there was no sufficient complaint to which any evidence offered by the plaintiff could be applied is not involved.

ID.—CHARACTER OF LAND SUED FOR—NEGATIVE ALLEGATION—DENIAL—BURDEN OF PROOF.—Where the action was for the recovery of a lot of land situated on Lake Merritt, in the city of Oakland, comprising one acre and one twelfth, with dwelling-house and other

improvements thereon, a negative allegation that it was not agricultural land, denied by the answer, need not be proved by the plaintiff; but the burden is upon the defendant to show that it was agricultural land within the meaning of the code.

ID.—OMISSION IN FINDINGS—DECISION NOT AGAINST LAW.—An omission in findings upon an issue upon which the defendant had the burden of proof, and upon which no evidence was introduced, does not render the decision for the plaintiff against law.

ID.—DEED ABSOLUTE—MORTGAGE—EVIDENCE OF PURCHASE—RECEIPTS—CONTRACT OF SALE.—Where there was a controversy as to whether a deed absolute in form, under which plaintiff claims title, was intended as a mortgage or as an absolute grant for purchase money, evidence is admissible for the plaintiff to show receipts for purchase money and a contract for the sale and purchase of the land, in proof of his title under the deed.

ID.—DEBT ESSENTIAL TO MORTGAGE BY DEED—BURDEN OF PROOF—SUPPORT OF FINDING.—A subsisting debt after the conveyance is essential to constitute it a mortgage, and the burden is on the one claiming it to be a mortgage to prove it by clear evidence. Where such burden is not sustained, but the evidence shows that there was no subsisting debt, a finding that the deed was intended as an absolute conveyance for the consideration expressed, and that it was not executed and delivered as security for any obligation, is sufficiently supported.

APPEAL from an order of the Superior Court of Alameda County denying a new trial. S. P. Hall, Judge.

The facts are stated in the opinion of the court.

Welles Whitmore, and Howard J. Peirsol, for Appellant.

Lincoln Sonntag, and R. E. Hewitt, for Respondent.

VAN DYKE, J.—This is an appeal by the defendant from an order denying his motion for a new trial, and comes up on a bill of exceptions used on the hearing of said motion. The action is for the recovery of a lot or tract of land on the east shore of Lake Merritt, in the city of Oakland. It is alleged in the complaint that the defendant entered into possession of the premises in question under a lease, for the term of two years, and thereafter remained in possession without the consent of the plaintiff after the expiration of the two years' term, and refused to surrender possession of said premises after demand therefor duly made. It is averred in

the answer that a deed executed by the defendant and wife of the premises in controversy, bearing date August 19, 1895, was not intended as an absolute conveyance, but was a mortgage, and that defendant did not enter into possession under the lease, but had been in possession as owner for years, and continued in possession after the execution of the deed and up to the time of the commencement of the action as the real owner. The court found that on the nineteenth day of August, 1895, the defendant, Joseph M. Warren, and his wife made, executed, acknowledged, and delivered to the plaintiff a deed of grant, bargain, and sale of the land and premises in question, for the consideration of three thousand dollars, with the intent that the said instrument should be an absolute conveyance; that the same was not executed and delivered as security for the payment to the plaintiff of the sum of three thousand dollars, or the performance of any other act or obligation, and that the same was not in fact a mortgage, and did convey the title and ownership of said real property to the plaintiff, and released the claim of ownership of the parties who executed said deed as aforesaid; that on the twentieth day of August, 1895, the plaintiff executed and delivered to the defendant a lease in writing, whereby he leased to the defendant, and the defendant hired and leased from the plaintiff, the real property in question for the term of two years from the nineteenth day of August, 1895; that the defendant possessed and occupied the said premises under the said lease to the nineteenth day of August, 1897, and the term expired on that date; that upon the expiration of the term of said lease the defendant remained in possession and occupation of said real property without the consent of the plaintiff, and withheld the possession of said premises from the plaintiff and excluded him therefrom; that on the twenty-fifth day of May, 1899, the plaintiff demanded the possession of said premises from the defendant, and he then and there refused to surrender them to the plaintiff.

The first point made by the appellant is, that the demurrer to the second amended complaint was improperly overruled. The appeal being only from the order denying the motion for a new trial, and not from the judgment, this question cannot be considered. And whether the complaint is sufficient to support the judgment, or whether the court erred in over-

ruling the demurrer to the complaint, can be considered only upon an appeal from the judgment. Neither of these matters is involved in the re-examination of an issue of fact after the trial and decision. An appeal from an order denying a new trial does not involve any consideration of the correctness of the judgment. The motion for a new trial is an issue of a distinct proceeding, and is to be heard upon an independent record, distinct from the record upon which the judgment depends. (*Bode v. Lee*, 102 Cal. 583; *Taylor v. Hill*, 115 Cal. 143; *Hall v. Suskind*, 120 Cal. 560; *Schroeder v. Pissis*, 128 Cal. 209; *Byxbee v. Dewey*, 128 Cal. 322.)

The appellant also makes the point that a nonsuit should have been granted, and his counsel urges as a reason therefor insufficiency of the complaint to state a cause of action, saying, "There was not a sufficient complaint to which any evidence offered by the plaintiff could be applied." And further, "Even if the complaint was sufficient, the evidence adduced failed to support it."

As to the first branch under this point, that the complaint was insufficient, what has been said with reference to the demurrer will apply also to this.

On the other branch of the point, that the evidence is insufficient, an inspection of the record satisfies us that the court was warranted in refusing the motion for a nonsuit.

Appellant also makes the point that the findings are insufficient to sustain the judgment; but, for the reasons already given in reference to the demurrer to the complaint, and upon the authorities cited under that head, the appellant is precluded from raising this question, there being no appeal from the judgment.

The complaint alleges that the premises in question are not agricultural land. The answer denies this. There was no evidence offered on this subject, and the findings are silent with reference thereto. It does "not devolve upon the plaintiff to prove his negative allegations." (Code Civ. Proc., sec. 1869; *Petaluma Paving Co. v. Singley*, 136 Cal. 616.) The tract of land or lot was only an acre and one-twelfth, and situate, as already stated, in the city of Oakland. It had a dwelling-house and other improvements. Therefore, it could not well be presumed to be a country farm or agricultural land, and the burden of showing that it was agricultural land,

within the meaning of the code, was upon the defendant, and no evidence was introduced upon that subject. Hence the decision is not against law.

On this appeal the only questions discussed by counsel that we are at liberty to consider are those relating to alleged errors of law, and also as to whether the findings are supported by the evidence. (*Schroeder v. Pissis*, 128 Cal. 209; *Brisson v. Brisson*, 90 Cal. 323; *Riverside Water Co. v. Gage*, 108 Cal. 240.)

The alleged errors in law occurring at the trial, as urged by appellant's counsel, consist in the admission in evidence of certain documents, to which objection was made and exception taken. These are as follows: As a part of the evidence in behalf of the plaintiff in reference to the transaction resulting in the conveyance to the plaintiff of the property in question, a receipt from the Union Savings Bank of Oakland to the plaintiff for \$2,118.25 was offered in evidence and objected to on the ground that it was immaterial, irrelevant, and incompetent, which objection was overruled by the court, and the receipt was read in evidence. The plaintiff continued testifying: "That represents \$2,118.25. It has been in my possession ever since the 19th of August, 1895. I paid Mrs. Muller \$318 on the note secured by the second mortgage on the property described in the complaint." Receipt shown and offered in evidence, which was objected to on the same grounds as the preceding; objection overruled and exception taken and read in evidence. This receipt reads as follows:

"August 20, 1895. Received of H. T. Holmes two hundred and ninety-one 25/100 dollars, being final payment in purchase of land city of Oakland, Alameda Co., as per deed dated August 19, 1895 (Jos. M. Warren and wife to H. T. Holmes).

"291.55.

JOSEPH M. WARREN."

It is also contended that the court erred in admitting in evidence the agreement between the plaintiff and defendant for the sale and purchase of the land. By this agreement the plaintiff agreed to sell to the defendant, clear of encumbrances, the land in question, on or before the twentieth day of August, 1897, for the sum of three thousand dollars, with eight per cent on that amount to the date of sale. Appended to this agreement is the following: "And the said Joseph M.

Warren and Lizzie F. Warren hereby agree that should we not have paid the amount heretofore stated to H. T. Holmes in purchase of said land on or before the 20th day of August, 1897, then and in that case this agreement shall lapse and become of no effect, and we shall have no claim whatever thereunder against said H. T. Holmes or against the said land." Signed and acknowledged by Joseph M. Warren and Lizzie F. Warren.

These several instruments objected to by defendant were introduced as a part of the evidence in support of the contention of the plaintiff that the instrument of August 19, 1895, executed by defendant and his wife to the plaintiff, was a conveyance in fee instead of a mortgage, and, as such, were properly admitted for that purpose.

Appellant contends that the evidence is insufficient to justify the decision.

The facts and circumstances disclosed by the record, if true, are sufficient to support the findings; and even if there were a substantial conflict in the evidence, which we do not think is the case here, the findings and decision of the court below would be conclusive.

The case seemingly most relied upon by the appellant, as it appears to be cited in his brief several times, is that of *Carrion v. Aguayo*, decided by this court in June, 1901, (65 Pac. 618,) but not carried into the California Reports. In that case the court found the deed, although purporting to be a conveyance in fee, to be a mortgage. It is said in the decision: "After the deed was made, defendants continued in possession of the premises as before. They never paid any rent or leased the premises. They continued to make small improvements as before. Nothing appears as to any agreement of sale having been made or any price being named for the deed. . . . There was testimony on the part of the plaintiff tending to contradict some of the matters above set forth. But, in case of a substantial conflict in the evidence, the finding of the court below is conclusive here. Not only this, but we think the finding is supported by the great preponderance of the evidence. If Saturnino Carrion took the deed from defendants in June, 1892, as an absolute conveyance of the property, it is strange that nothing was said in the negotiations as to the price thereof. . . . If Carrion had in fact

purchased the property, it would seem that in the ordinary course of business he would have entered into possession of it, or if he allowed defendant to remain in possession it would have been under a lease of some kind." Here, as already shown, the plaintiff paid three thousand dollars for the property, and thereafter gave the defendant a lease of the premises for a definite period, and also entered into an agreement to convey the land at a stipulated price within a certain period, making the case altogether different from the one relied upon by appellant.

In this case there is no pretense that Holmes, after the transaction in question, could have maintained an action against Warren to recover the three thousand dollars mentioned as the consideration of the deed in question; and the test in all this class of cases is, Was there a subsisting debt after the conveyance?—for, to be a mortgage, there must necessarily be a debt for which the conveyance is security. As said in *Henley v. Hotaling*, 41 Cal. 22, "If there is no debt there is no mortgage." And in *Ganceart v. Henry*, 98 Cal. 281, it is said: "A deed of conveyance absolute on its face is certainly some evidence that the transaction is what it purports to be, viz., a sale. To establish an equity superior to the deed and authorize a determination that the deed was given as security for an existing debt, the testimony, if parol in character, should establish a clear case." (Citing *Hopper v. Jones*, 29 Cal. 19,¹ and *Henley v. Hotaling*, 41 Cal. 22.) In *Bryant v. Broadwell*, 140 Cal. 490, in the opinion it is said: "Defendant's claim that the deed was in fact executed as a mortgage finds considerable support in the evidence, but there was evidence contrary thereto, sufficient to sustain the finding. It must be borne in mind in this connection that if a deed purports on its face to grant real property, the burden is on the party claiming it to be only a mortgage to establish that fact." Here that was not done.

The order appealed from is affirmed.

Shaw, J., and Angellotti, J., concurred.

¹ 87 Am. Dec. 146.

[S. F. No. 3972. Department One.—November 26, 1904.]

In the Matter of the Estate of JOHN MURPHY, Deceased.
ANNA J. MURPHY, Executrix, Appellant, v. MARGARET M. O'CONNOR, and JOHANNA O'CONNOR, Respondents.

ESTATES OF DECEASED PERSONS — PARTIAL DISTRIBUTION — APPEAL BY EXECUTRIX—ISSUE OF LAW—SUFFICIENCY OF PETITION.—An executrix may appeal from an order for partial distribution to legatees under the will, where she presents for review an issue of law as to the sufficiency of the petition to show that there were sufficient assets to pay the legacies without loss to the creditors. In such case both the power of the executrix to comply with the order and the right to an immediate distribution are involved, and upon these questions the executrix is interested, both personally and on behalf of the creditors, and has a clear right of appeal.

ID.—SUFFICIENCY OF PETITION AS TO EXECUTRIX—DEMURRER PROPERLY OVERRULED.—Where the petition for partial distribution alleged, in the exact language of the statute, "that said estate is but little indebted, and that the shares and legacies of your petitioners may now be allowed to them without loss to the creditors of the estate of said deceased," it is sufficient as against the executrix; and her demurrer thereto, on the ground that the facts stated do not entitle the petitioner to relief, and that the petition was uncertain as to the value or nature of the estate, was properly overruled.

ID.—KNOWLEDGE OF EXECUTRIX.—The executrix, generally, must have greater knowledge of the value and character of the property, the amount of money on hand, and the amount of the indebtedness than any other person.

ID.—STATEMENT OF ULTIMATE FACTS SUFFICIENT.—A statement of the ultimate facts concerning the nature of the estate and the amount of the debts, which, according to the code, the court must find to exist before making the order for partial distribution, affords sufficient information of the grounds on which the application will be made to enable the executrix at least to make any proper opposition or defense. If it accomplishes this, it serves the purpose for which pleadings are required in such case.

ID.—CONTROVERSIES AS TO LEGACIES—EXECUTRIX NOT INTERESTED.—The executrix as such, has no interest in any controversy which concerns only the rights of legatees as between themselves; and she cannot urge that the petitioning legatees had forfeited their rights to their legacies because of an alleged violation of the will, that if any one named therein should contest the same he or she should take nothing under it, where that question affects only the rights of residuary

devises, and does not affect the executrix in her representative capacity.

Id.—CONCLUSIVENESS OF ORDER AS TO DEFAULTING LEGATEES AND DEVISEES.—Where none of the other legatees or devisees appeared as such at the hearing, and in no manner objected to the order for partial distribution to the petitioning legatees, and the order has become final and conclusive as to them, it is equally conclusive upon the executrix in her capacity as residuary devisee, so far as the rights of the petitioning legatees are concerned, where she only appeared and objected to their petition in her representative capacity as executrix. As devisee, she must be considered as one who has suffered default.

APPEAL from an order of the Superior Court of the City and County of San Francisco making partial distribution of the estate of a deceased person. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

J. C. Bates, for Appellant.

William E. White, and Edward C. Harrison, for Respondents.

SHAW, J.—This is an appeal by Anna J. Murphy, in her capacity as executrix of the estate of John Murphy, deceased, from an order of partial distribution directing her, as such executrix, to pay to each of the two respondents a legacy of five hundred dollars bequeathed to them, respectively, by the will of the deceased.

The respondents claim that, under the facts shown in the record, the only effect of the partial distribution is to reduce the residue of the estate to the extent of the legacies distributed; that it affects the interests of the residuary devisees only, and hence, they say, the executrix, as such, has no interest in the controversy, is not a "party aggrieved" by the order, and has no right of appeal therefrom. It may be conceded that this would be the case if the facts showed no other grounds of appeal than above stated. But the appellant presents for review an issue at law as to the sufficiency of the petition to show that there were sufficient assets to pay the legacies without loss to the creditors. In such a case both the power of the executrix to comply with the order and the right to an immediate distribution are involved, and upon these

questions the executrix is interested, both personally and on behalf of the creditors, and has a clear right to appeal. (*In re Welch*, 106 Cal. 429; *Estate of Kelley*, 63 Cal. 106; *Estate of Mitchell*, 121 Cal. 391.)

This issue is presented by demurrer to the petition for partial distribution. The grounds of the demurrer are, that the facts stated do not entitle the petitioner to the relief asked for, and that the petition is uncertain, in that it fails to state the value or nature of the estate, or whether it is money, chattels, or land, or the amount of encumbrances, if any. The only statement on the subject contained in the petition is as follows: "That said estate is but little indebted; and that the shares and legacies of your petitioners may now be allowed to them without loss to the creditors of the estate of said deceased." This is in the exact language of that part of section 1661 of the Code of Civil Procedure declaring what must be made to appear at the hearing before the order can be granted. Without determining whether or not this would be a sufficient statement of facts if the objection were made by an heir, or by another legatee, we are satisfied that it is sufficient as against the executrix, who, generally, must have greater knowledge of the value and character of the property, the amount of money on hand, and the amount of the indebtedness than any other person. The code does not attempt to prescribe the form or contents of the petition. It is clear that elaborate pleadings are not required or contemplated in the proceeding and, so far as the executrix is concerned, they are not necessary. On the subject of pleadings in probate courts generally, the author of *Woerner on Administration* says: "Their procedure is generally summary, requiring no pleading in the technical sense, nor adherence to artificial rules in the statement of a cause of action or defense. An intelligible statement of an existing substantial right, which the court has jurisdiction to enforce, is a sufficient allegation of all matters necessary to sustain a judgment." (1 *Woerner on Administration*, p. *339.) The authorities on which this statement is founded are for the most part decisions of states having a less formal probate procedure than our own, and hence it is doubtful if the rule stated can be considered universally, or even generally, applicable to probate proceedings under our system.

But even if a more rigid rule is applied, as may be inferred from the provisions of section 1713 of the Code of Civil Procedure, we think a statement of the ultimate facts concerning the nature of the estate and the amount of the debts which, according to the code, the court must find to exist before making the order, will afford sufficient information of the grounds on which the application will be made to enable the executrix, at least, to make any proper opposition or defense. If it accomplishes this, it serves the purposes for which pleadings are required. The demurrer of the executrix was properly overruled.

The appellant further claims that the petitioners had forfeited their right to the legacies because of an alleged violation of a provision in the will that if any one named therein should contest the same he or she should take nothing under it. This is a question in which, as executrix, the appellant has no interest, and which she cannot have decided on this appeal. It does not affect the executrix in her representative capacity. It concerns only the rights of the residuary devisees. In such cases the executrix "cannot litigate the claims of one set of legatees against the others at the expense of the estate" (*Bates v. Ryberg*, 40 Cal. 465), nor maintain an appeal. (*Estate of Wright*, 49 Cal. 551; *Estate of Marrey*, 65 Cal. 287; *Merrifield v. Longmire*, 66 Cal. 180; *Jones v. Lamont*, 118 Cal. 503;¹ *Estate of Healy*, 137 Cal. 474; *McCabe v. Healy*, 138 Cal. 90.) The distinction is thus stated in *In re Welsh*, 106 Cal. 429: "It is a sound proposition that administrators, general or special, like receivers and other trustees or custodians of funds for designated purposes, are not ordinarily affected by orders in reference to their disposition, and, therefore, will not be heard on appeal from such orders. But this rule has its well-defined limitations. Wherever an order or decree involves a construction of the proper exercise of the duties of the officer, whenever it presents a question as to the right or power of the trustee to comply with it, wherever obedience to it might subject him to liability, the rule does not operate. Even where the order is one merely for the payment of funds, if any of these questions arise under it and personal liability may attach, the right of the officer to appeal is recognized and upheld." Moreover, a decision of the question on this appeal

¹ 62 Am. St. Rep. 251.

would be of no avail, even to the real parties interested. The legatees and devisees did not appear at the hearing, or in any manner object to the order, and as to them it has become final and conclusive so far as it allows the legacies of the petitioners. The only matter which can be the subject of further action in the court below, if the order should be reversed on this appeal, is that in which alone the executrix in her representative capacity is interested,—namely, the sufficiency of the petition in respect to its statement of the condition and value of the estate, and the amount of the debts. Although the executrix is also a residuary devisee, yet, as she neither objected or appeared as devisee, she is as fully concluded with respect to her rights as devisee as are the other devisees. Her appearance as executrix gives her no standing to claim rights which she possesses solely as devisee. As such devisee she must be considered as one who has suffered default.

No other questions are presented.

The order is affirmed.

Angellotti, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[S. F. No. 3109. Department One.—November 26, 1904.]

B. P. WALL, Respondent, v. BOARD OF DIRECTORS OF DEAF, DUMB, AND BLIND ASYLUM, etc., et al., Appellants.

DEAF, DUMB, AND BLIND ASYLUM — POWERS OF BOARD — REMOVAL OF PHYSICIAN.—The board of directors of the deaf, dumb, and blind asylum having elected a physician, who, under subdivision 4 of section 2255 of the Political Code, is to be elected for the term of two years, have no power to remove him during the term prescribed. The power given by subdivision 5 of that section, "to remove, at pleasure, any teacher or employee," is to be construed as referring only to employees or officers of a like kind or class with the teachers who hold without fixed term, and not as including the physician, whose term of office is fixed, and whose removal is provided for only by section 772 of the Penal Code.

Is.—BY-LAWS OF BOARD—POWER OF REMOVAL.—The board having no power under the statute to remove its physician during the term for which he was elected, could not confer such power upon itself by its by-laws.

Is.—TIME OF ELECTION—REPEAL OF BY-LAWS—PRESUMPTION OF REGULARITY.—The fact that the time of the election of the physician did not occur on the day prescribed in the by-laws is immaterial where it appears that the by-laws had been previously repealed under proceedings for repeal which must be presumed to have been regular.

Is.—RETROSPECTIVE ELECTION.—Assuming that the board had no power to elect the physician retrospectively for the period which had elapsed at the time of election, the result would be merely that his term of two years would either commence at the date of the election or would be proportionately shortened; whether it would be one or the other, it is deemed unnecessary to determine.

Is.—COMPENSATION OF PHYSICIAN.—The term "employee" used in subdivision 6 of section 2255 of the Political Code, giving power to the board "to fix the compensation of teachers and employees," may be deemed used in a larger sense so as to include the compensation of the physician. The same words may have different constructions to effectuate the intention of the act. Nor is it clear that in the absence of statutory provision the power to elect an officer does not carry with it the power to provide for the compensation of the officer.

APPEAL from a judgment of the Superior Court of Alameda County. John Ellsworth, Judge.

The facts are stated in the opinion.

A. A. Moore, and E. Nusbaumer, for Appellants.

Charles A. Shurtleff, and Whitworth & Shurtleff, for Respondent.

SMITH, C.—The plaintiff was elected by the defendant, June 2, 1899, "to serve as physician of the institution for a term of two years, from and after April 2, 1899, at a salary of \$1,200 per year; but by an order of the board, of date Sept. 29, 1899, the office was declared vacant, and another physician appointed." This proceeding was commenced to test the validity of the latter order, which in the court below was adjudged to be void. The appeal is from the judgment. There is a bill of exceptions in the record, on which, it is claimed, that, in certain particulars to be adverted to, the evi-

dence was insufficient to justify the findings. The points urged by the appellant are: 1. That under the by-laws of the board, it had the power to remove any officer or employee at will; 2. That it had the power to remove the plaintiff under the provisions of section 2255 of the Political Code, prescribing the powers and duties of the board; and 3. That the plaintiff was not legally elected.

But of these the first is manifestly untenable; for if, under the statute, the board had no power to remove the plaintiff, it could not confer such power on itself by its by-laws. And with regard to the third, it is equally clear that, on the evidence produced, the court was justified in the finding that the plaintiff was legally elected. The record of his election is set out in defendant's answer; and if it be true that the election did not take place on the day prescribed by the by-laws—as is claimed by appellant—the fact would be immaterial, if the by-laws had been previously repealed; and that such is the case is expressly found by the court, and, we think, on sufficient evidence. It is indeed objected that the order of repeal was not passed by unanimous vote (which is true), and that it does not appear that the month's notice of intention to repeal, otherwise required by the by-laws, had been given. But the presumption is, that the proceedings were regular (Code Civ. Proc., sec. 1963, subd. 15), and in the absence of evidence to the contrary the court was justified in so finding. Another objection urged is, that the board had no power to elect the plaintiff retrospectively for the period which had elapsed at the time of the election; which is perhaps true. But if this be so, the result would be merely that his term of two years would either commence at date of election, or would be proportionately shortened; whether the one or the other, need not now be determined.

It remains, therefore, to consider only "the powers of the board," under the statute, which, so far as material, are as follows:—

- "2. To elect the principal teacher;
- "3. To elect a treasurer, who shall not be a member of the board of directors;
- "4. To elect a physician for the asylum, for the term of two years, who shall not be a member of the board of directors;

"5. To remove, at pleasure, any teacher or employee;

"6. To fix the compensation of teachers and employees."
(Pol. Code, sec. 2255.)

And by section 2268 it is provided that the principal teacher "is the chief executive officer of the asylum, with powers and duties as follows: . . .

"2. With the consent of the board of directors, to fix the number of and appoint and remove the assistant teachers and employees;

"3. To prescribe and enforce the performance of the duties of the assistant teachers and employees," etc.

Here the express provision is, that the physician shall be elected "for the term of two years"; which implies that he is not to be removed by the board, or otherwise, during the term prescribed; and this implication is strengthened by the failure to provide for a fixed term in the case of the "principal teacher" and "treasurer," who under section 16 of article XX of the constitution—if public officers, and otherwise, upon general principles—will hold only "during the pleasure of the board."

But this can be said only with the qualification that there be no other provision in the act indicating such intention; and such a provision, it is claimed by the appellant, is to be found in subdivision 5 of the section—empowering the board "to remove, at pleasure, any teacher or employee." But, notwithstanding the generality of the term "employee,"—which includes officers (*United States v. Maurice*, 2 Brock. 96, Fed. Cas. No. 15747, cited, *Patton v. Board of Health*, 127 Cal. 394¹),—the claim is, we think, untenable. For, upon familiar principles, the coupling of the term "employee" with the antecedent term "teacher" indicates that the former is used in a restricted sense, as applying only to employees "of like kind" with "teachers," or, as otherwise expressed by the author, employees "*ejusdem generis*," (Broom's Maxims, 565-567, 570); by which is meant some kind or class of employees in which teachers are included—thus excluding classes of employees which do not include them. The terms used by the author, "kind" and "genus," refer to the familiar logical distinction between *genus* and *species*; and the principle may be technically expressed by saying that—to apply the maxim

¹ 78 Am. St. Rep. 66.

—the general class or *genus* of employees is to be regarded as divided into two species or kinds, the one excluding, the other including, teachers; and that the term employees is to be construed as referring to the latter class only. Thus, for example, if we regard the *genus, employees*, as divided into the two species of officers and employees not officers, the rule would require that the expression “any teacher or employee” should be construed as excluding the former and applying only to the latter.

This is in fact assumed by both parties; and, accordingly, the question principally discussed in the briefs is whether the physician provided for in the act is, or is not, an officer;—by which is meant a public officer, for that he is an officer cannot be doubted. This is an interesting question, and while, perhaps, not material to the principal question involved, is yet so connected with it as to require discussion. In considering it, it is to be observed, the election of principal teacher, treasurer, and physician is provided for, in identical terms, in three consecutive subdivisions; and from this, and the essential similarity of their employments, these must be regarded as constituting a class apart from other employees, and each as coming within the application of the maxim, *Noscitur a sociis*. It will be proper therefore, first, to consider the question with reference to the class generally, and afterwards to refer to their differences. Pursuing this course, it is to be observed that all these offices are of a permanent nature; that they involve the performance of public functions; and that they are created, and the election of the officers provided for, by the sovereign legislature. Such offices are therefore essentially distinguished from employments existing only in the discretion of the board, and involving the performance of duties more or less casual and temporary; and hence, under any definition of the term, their incumbents may well be regarded as public officers. (*Patton v. Board of Health*, 127 Cal. 388;¹ *People v. Harrington*, 63 Cal. 257; *People v. Wheeler*, 136 Cal. 652.) This is sufficiently manifest with regard to the principal teacher and treasurer; and, indeed, the former is expressly designated in the act as the “chief executive officer” of the asylum. Nor can the case of the physician be distinguished in any essential particular. He

¹ 78 Am. St. Rep. 66.

therefore comes clearly within the application of the maxim cited. But whether or not we call the officers named public officers, the same reasons which lead us to distinguish officers from employees, and consequently the same rule, equally applies to them. They must therefore be regarded with reference to the question before us, if not as public officers, at least as *quasi* such. Having regard, therefore, to the intention of the act, it would seem unreasonable to suppose that such officers, or *quasi* officers, come within the purview of the provision in the fifth subdivision of the section. Or, at least, if such a construction be admissible, or even if it be probable, it is not so clearly so as to warrant us in disregarding the express terms of the fourth subdivision of the section, or the intention of the legislature thus clearly manifested that the term of the physician shall be for two years.

It is indeed urged by the appellant that upon this restricted construction of the term "employee" in this and in the sixth subdivision of the section, there would be no provision in the act either for the removal or for the compensation of the officer in question. But as to his removal, that is provided for by the general law, (Pen. Code, sec. 772); otherwise, there would be a defect in the law. As to compensation, assuming that the term "employees" is used in the sixth subdivision in the larger sense, so as to include the officers or *quasi* officers of the institution, yet it would not follow that it is to be so construed in other parts of the act. Such would be the common rule; but where the occasion demands it "the same words may have different constructions to effectuate the intention" of the act. (Potter's Dwarrris on Statutes, 194-196.) Nor, giving the term in question the restricted construction we have assigned to it, is it clear that the power to elect does not—in the absence of statutory provision—include the power to provide for the compensation of the elected officer (Civ. Code, sec. 3522; Broom's Maxims, 463); and if it be otherwise, all that can be said is, that there is a defect in the law. On the other hand, giving to the appellant's argument all the force that can be possibly given it, it is more than counteracted by the use of the same term in the second and third subdivisions of section 2268 of the Political Code, where the principal teacher is authorized "to *appoint* and *remove* the assistant teachers and employees," and to *prescribe* and *enforce*

their duties; and where the term "employees" cannot be construed as applying to the permanent officers or *quasi* officers of the institution without making these provisions repugnant to other provisions of the act.

We advise that the judgment be affirmed.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Shaw, J., Angellotti, J., Van Dyke, J.

[S. F. No. 3015. Department One.—November 23, 1904.]

GEORGE W. WITTMAN, Respondent, v. POLICE COURT
OF THE CITY AND COUNTY OF SAN FRANCISCO,
and GEORGE H. CABANISS, Judge, Appellant.

**CERTIORARI—ORDER OF POLICE JUDGE—SUMMONING OF TRIAL JURY BY
SHERIFF—JURISDICTION—WAIVER OF ERROR—REMEDY BY APPEAL.—**

The writ of *certiorari* or review will not lie to annul an order of a judge of the police court of the city and county of San Francisco, made under section 230 of the Code of Civil Procedure, for the summoning of a trial jury by the sheriff in a case of misdemeanor. Such order was within the jurisdiction of the police judge, and if any error was involved in the making of it the defendant might waive such error, and if it was not waived he had an adequate remedy by appeal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion.

John J. Barrett, for Appellant.

P. F. Dunne, and J. A. Hosmer, for Respondent.

GRAY, C.—This is a *certiorari* proceeding in which the trial court gave the plaintiff judgment annulling an order of defendant which directed the sheriff of the said city and

county to summon forty jurors for the trial of the plaintiff on a charge of misdemeanor then regularly pending before the defendant police court. The defendant appeals from the judgment.

The writ of *certiorari*, otherwise denominated the writ of review, is an extraordinary remedy, and lies only "when an inferior tribunal, board, or officer, exercising judicial functions, *has exceeded the jurisdiction* of such tribunal, board, or officer, *and there is no appeal*, nor, in the judgment of the court, any plain, speedy, and adequate remedy." (Code Civ. Proc., sec. 1068.)

It is provided in section 230 of the Code of Civil Procedure as follows: "When jurors are required in any of the justices' courts or in any police or other inferior court, they shall, upon the order of the justice, or any one of the justices where there is more than one, or of the judge thereof, be summoned by the sheriff, constable, marshal, or policeman of the jurisdiction." In the regular course of the misdemeanor case pending before the herein defendant police court, the defendant therein having demanded a jury, it became necessary for the judge of said court to construe said section 230 for the purpose of determining whether it gave him any discretion as to which of the officers mentioned the venire should be directed. He seems to have concluded that it did give him a discretion, and exercised that discretion in favor of the sheriff. The construction of the section and the issuance of the venire were not only matters within the jurisdiction of the police judge, but were absolutely necessary to the further progress of a case in which it is admitted that the police court had jurisdiction of the subject-matter as well as of the person of the defendant. To what officer the venire should run was a question that it was the necessary duty of the police judge to decide. It is not necessary for us to say, and we do not here even intend to intimate, whether he decided the question correctly in directing the venire to the sheriff. If he decided it incorrectly, it was only an error that might have been waived without invalidating any subsequent judgment in the action, and, if not waived, it might also have been reviewed as an error of law on appeal from any judgment that might have followed. It may not be amiss in this connection to say that there is nothing in the petition for this writ to show that the summoning of the

jury by the sheriff was not waived or consented to by petitioner, but, so far as we can gather from the petition, the case was continued from time to time after the jury was summoned, and it is not shown that any objection was made in the police court at any time on account of the sheriff having summoned the jury. The writ should have been refused for the dual reason that the order of which the annulment was sought was clearly a matter within the jurisdiction of the police judge, and if any error was involved in the making of it, the defendant in the action had an adequate remedy by appeal. (*Bennett v. Wallace*, 43 Cal. 25; *Valentine v. Police Court*, 141 Cal. 615.)

This court has held in two well-considered cases that the denial of a jury altogether in a misdemeanor case was but an error of law, and that the justice's court did not in such denial exceed its jurisdiction. (*Ex parte Miller*, 82 Cal. 454; *Powelson v. Lockwood*, 82 Cal. 613.) If an order denying a jury trial altogether is not in excess of jurisdiction, it is difficult to see how an order merely directing what officer shall summon persons from whom to select a jury can be said to be in excess of jurisdiction. In the still later case of *In re Fife*, 110 Cal. 8, also well considered, it is said: "A jury may be waived in any civil case, and it is not contended by any one that the refusal of a demand for a jury in a civil case affects the jurisdiction, or is anything more than an error; and, as a jury may, under the constitution, be waived 'in all criminal cases not amounting to a felony,' a jury is not a necessary constituent part of a court for the trial of a misdemeanor, and the refusal of the court to allow a jury on such a trial is mere error. This principle will be found to be established by the general authorities; but as it has been definitely declared by decisions of this court, we need look no further."

We advise that the judgment be reversed, with directions to the court below to deny the petition of plaintiff in every particular.

Harrison, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed, with directions to the court below to deny the petition of plaintiff in every particular.

Shaw, J., Angellotti, J., Van Dyke, J.

[S. F. No. 3104. Department One.—November 28, 1904.]

LLOYD C. HARLOW et al., Respondents, v. STANDARD IMPROVEMENT COMPANY, Appellant.

ACTION BY HUSBAND AND WIFE—INJURY TO BUILDING—JOINT OWNERSHIP—EVIDENCE—MOTION FOR NONSUIT.—In an action by a husband and wife to recover damages for an injury to their building, where issue was joined upon an allegation that they were the owners and possessed of the building and lot upon which it stood, and there was no evidence as to the record title of the property, testimony that the house was built by them, and that they had occupied it for about ten years, was sufficient evidence of joint ownership to justify the court in overruling a motion for nonsuit for failure to prove it.

ID.—TENANCY IN COMMON.—Under section 384 of the Code of Civil Procedure, the plaintiffs, as cotenants, or tenants in common, are entitled to maintain the action.

ID.—NATURE OF TITLE—CONSTRUCTION OF CODE—ABSENCE OF PRESUMPTION.—Under section 161 of the Civil Code, the husband and wife may hold property as joint tenants, tenants in common, or as community property; and in the absence of any evidence as to the source of the moneys with which the house was built, or of the manner in which the property was acquired, there is no presumption that it was community property or the separate property of either spouse, rather than it was held by them in joint tenancy, or tenancy in common.

ID.—INJURY THROUGH NEGLIGENCE—CARELESS USE OF STEAM-ROLLER—MAXIM.—Where it appeared that the injury occurred by the use of a steam-roller by the defendant in street-work, which was carelessly allowed to run against the building of plaintiffs and to injure it and the fences, sidewalk, shrubbery, and lawns surrounding it, the manner in which the injury was caused sufficiently sustains the finding of the jury that it was through the negligence of the defendant. The case is one in which the maxim *Res ipsa loquitur* is peculiarly applicable.

ID.—OFFER OF DEFENDANT TO REPAIR INJURY—PLEADING—INADMISSIBLE EVIDENCE.—The offer on the part of defendant to show that forty-eight hours after the injury it offered to put the building back in as good condition as it was before or to defray the expense thereof was properly refused, where there was no issue presented by the answer that the cost would have been less to the defendant if the repairs were made by it rather than by the plaintiffs or their employees, and there was no showing to that effect.

ID.—INAPPLICABLE RULE.—The rule which obtains in actions for damages for breach of contract, that it is the duty of the injured, if within his power to protect himself against any increase of dam-

age that may accrue after the breach, has no application where the damage to the premises of the plaintiffs through the negligence of the defendant is complete at the time of the injury.

ID.—INSTRUCTIONS—PROMPT REPAIRS—CHANGE OF RESIDENCE AFTER SUIT.—Where the jury were instructed that if plaintiffs could have prevented any loss by prompt repairs they were bound to do so, and that they could only recover for actual damage suffered by them prior to the commencement of the action, it is not to be presumed that the jury included in their verdict any damage by reason of delay in repairing the house, or any expense incurred by removal from the house after the action was commenced.

ID.—EXTENT OF DAMAGES—SUPPORT OF VERDICT.—Where there was evidence tending to show that the amount of damages was greater than that awarded to the jury, and it was apparent that the permanent injury to the building, by displacing it from its foundations, breaking its chimneys, and destroying its plastering, is a greater damage than the mere cost of patching it up so as to make it serviceable, the verdict as to the amount of damages was sufficiently supported, notwithstanding evidence for the defendant that a portion of the damage could be repaired for less than the amount of the verdict.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. S. P. Hall, Judge.

The facts are stated in the opinion.

D. H. Whittemore, for Appellant.

The verdict was excessive under the evidence as to the cost of repairs. (*Sloan v. Southern California Ry. Co.*, 111 Cal. 668.) Testimony to show that if the plaintiffs had accepted defendant's offer the plaintiffs would not have suffered so much damage was proper. (*Parsons v. Sutton*, 66 N. Y. 92; *Beymer v. McBride*, 37 Iowa, 114; *Dent v. Dunn*, 3 Camp. 296.) The evidence failed to prove a joint ownership, and the motion for a nonsuit should have been granted. (*McCord v. Seale*, 56 Cal. 262; *Weinreich v. Johnston*, 78 Cal. 254; *Mott v. Smith*, 16 Cal. 557; *Barrett v. Tewksbury*, 18 Cal. 334.) There was no proof of negligence. (*Rowe v. Such*, 134 Cal. 573.)

Chapman & Clift, and W. H. O'Brien, for Respondents.

The verdict for damages was not excessive as matter of law, and must be sustained under the evidence. (*Aldrich*

v. *Palmer*, 24 Cal. 513; *Boyce v. California Stage Co.*, 25 Cal. 460; *Wheaton v. North Beach etc. R. R. Co.*, 36 Cal. 590; *Lee v. Southern Pacific R. R. Co.*, 101 Cal. 118; *Howland v. Oakland St. Ry. Co.*, 110 Cal. 513; *Tedford v. Los Angeles etc. Co.*, 134 Cal. 76; *Miss v. Hearst*, 130 Cal. 630; *Russell v. Dennison*, 45 Cal. 337.) The refusal of the nonsuit was correct. (*Mott v. Smith*, 16 Cal. 557; *Ferris v. Baker*, 127 Cal. 522.) Negligence was presumed from the nature of the injury. (*Judson v. Giant Powder Co.*, 107 Cal. 549.¹)

HARRISON, C.—The plaintiffs seek by this action to recover from the defendant damages sustained by them through its negligence. It is alleged in the complaint that on August 13, 1900, the defendant was engaged in doing certain street-work on Kennedy Street, in the city of Oakland, in front of the residence of the plaintiffs, making use therefor of a steam-roller, and that while so engaged the roller, by reason of the negligence and carelessness of the persons managing the same, ran against the building of the plaintiffs and injured it, and the fences, sidewalk, shrubbery, and lawns surrounding it, to their damage in the sum of two thousand dollars. The cause was tried by a jury and a verdict rendered in favor of the plaintiffs for one thousand dollars. From the judgment entered thereon and from an order denying a new trial the defendant has appealed.

At the close of the plaintiffs' case the defendant moved for a nonsuit upon the ground that they had failed to establish a joint ownership of the premises. The motion was denied, and this ruling is now assigned by the appellant as error.

It is alleged in the complaint that at the time of the occurrence the plaintiffs were, and still are, husband and wife, and the owners of and possessed of the building and lot upon which it stood, and this allegation was denied in the answer. There was no evidence as to the record title of the property, or that it had ever been conveyed to the plaintiffs, or either of them, but there was testimony that the house was built by them, and that they had occupied it for about ten years. The testimony of Mrs. Harlow that she and her husband had the house built was sufficient evidence of their joint ownership to

¹ 48 Am. St. Rep. 146.

justify the ruling of the court. Under section 161 of the Civil Code the husband and wife may hold property as joint tenants, tenants in common or as community property; and in the absence of any evidence of the source of the moneys with which the house was built, or of the manner in which the property was acquired, there is no presumption that it was community property, or the separate property of either spouse, rather than that it was held by them in joint tenancy, or as tenants in common. (See *Wagoner v. Silva*, 139 Cal. 559.) Under section 384 of the Code of Civil Procedure, plaintiffs, as cotenants or tenants in common, are entitled to maintain the action.

The manner in which it appeared that the injury was caused sufficiently sustains the finding of the jury that it was through the negligence of the defendant. (*Judson v. Giant Powder Co.*, 107 Cal. 549.¹) The case is one in which the maxim *Res ipsa loquitur* is peculiarly applicable.

The offer on the part of the defendant to show that forty-eight hours after the injury it offered to put the building back in as good condition as it was before, or to defray the expense thereof, was properly refused. The only issues presented for trial by its answer were the plaintiffs' ownership of the property, the negligence of the defendant in causing the injury, and the amount of damage done to the property. The trial was chiefly occupied with the latter issue, upon which a large amount of testimony was given by each of the parties to the action, and the amount of the damage was determined by the verdict of the jury. The amount of the damage sustained by the property was the same, irrespective of the person by whom the repairs should be made, and there is no averment in the answer, nor did the defendant offer to show at the trial, nor does it now claim, that the repairs could have been made by it at any less cost than if made by the plaintiffs, or by whomsoever they might employ. The rule which obtains in an action for damages arising out of the breach of a contract that it is the duty of the injured party, if within his power, to protect himself against any increase of damage that may accrue after the breach, has no application under the facts of the present case. Here the damage was complete at the time of the injury, and before the offer of defendant, and

¹ 48 Am. St. Rep. 146.

in the absence of any showing to the contrary the cost of the repairs would be the same whether made by the defendant or the plaintiffs. If for any reason the cost would have been less to the defendant, that was a matter for special defense which should have been pleaded as well as made known to the plaintiffs at the time of the offer. The jury were, moreover, instructed that if it was shown that the plaintiffs could have prevented any part of the loss by prompt repairs they were bound to do so.

The injury to the house was committed August 13th. Mrs. Harlow testified that they did not remove from the house until September 21st. The present action was commenced September 20th, and the court instructed the jury that the plaintiffs could only recover the actual damage suffered by them prior to the time that the action was commenced. This was, in effect, an instruction that they were not entitled to recover for any damage sustained by reason of being compelled to seek a new residence. Under these instructions it is not to be assumed that the jury included in their verdict any damage sustained by reason of any delay in repairing the house.

It cannot be held that the verdict was excessive, or unsustainable by the evidence. It was shown that the cement walk had been broken up, the fence in front of the house demolished, the lawn and shrubbery destroyed, the house itself struck by the roller with such force that it was displaced from its position upon its foundations and permanently injured. Testimony was given by several experts that the amount of damage was greater than that awarded by the jury, and although it was shown on the part of the defendant that a portion of this damage could be repaired for less than the amount of the verdict, the jury were at liberty to consider—what is apparent to any one—that the permanent injury to the building, by displacing it from its foundations, breaking its chimneys, and destroying the plastering, is a greater damage than the mere cost of patching it up so as to make it serviceable.

The judgment and order denying a new trial should be affirmed.

Gray, C., and Cooper, C., concurred.

OXLY. Cal.—31

For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

Van Dyke, J., Angellotti, J., Shaw, J.

[S. F. No. 3027. Department One.—November 28, 1904.]

NORA HELEN GERTRUDE O'NEILL MURPHY, etc.,
Respondent, v. BERTRAM SAMUEL JOSEPH FIN-
NISTON O'NEILL MURPHY, Appellant.

ACTION UPON FOREIGN JUDGMENT—PLEADING—JURISDICTION OF FOREIGN COURT—ABSENCE OF DEMURRER.—In an action upon a foreign judgment in English money, made and entered in the Queen's Bench division of the high court of justice of the supreme court of judicature in England, a complaint averring that said court "had jurisdiction of the subject-matter of said action and of the parties thereto," and that said judgment "was duly given, made, and entered" in and by said court, is sufficiently certain, in the absence of a demurrer, on the subject of jurisdiction in the English court.

Id.—GENERAL FINDINGS—JURISDICTION INVOLVED.—Where the findings are that all of the allegations of the complaint are true, they sufficiently show the jurisdiction of the court in which the judgment sued on was rendered.

Id.—VALUE OF JUDGMENT—RATE OF INTEREST—PRESUMPTION.—Where the complaint alleged the value of the English judgment in lawful money of the United States, and alleged that it was wholly unpaid, and prayed for interest thereon at the rate of seven per cent per annum from the date of the judgment, the complaint is sufficient as to the value of the judgment, and it must be presumed that the law of England as to interest on the judgment is the same as the law of this state in the absence of evidence to the contrary, and the interest prayed for was properly allowed in computing the amount of the judgment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Thomas F. Graham, Judge.

The facts are stated in the opinion.

Bishop & Wheeler, and William Rix, for Appellant.

The sufficiency of the complaint to state a cause of action may be raised upon appeal for the first time. (*Holly v.*

Heiskell, 112 Cal. 174.) Section 456 of the Code of Civil Procedure has no application to foreign judgments, and the facts should have been stated to show jurisdiction of the foreign court. (*Hollister v. Hollister*, 10 How. Pr. 539; *McLaughlin v. Nichols*, 13 Abb. Pr. 244.) There is no law of California allowing interest on foreign judgments. (*Cavender v. Guild*, 4 Cal. 250.)

Elliott McAllister, and Frank H. Powers, for Respondent.

The complaint was sufficient to show the jurisdiction of the English court. (*Dore v. Thornburgh*, 90 Cal. 64.¹) Legal interest is allowable not only on judgments in this state, but also for breach of any obligation to pay money only. (Civ. Code, sec. 3302.) The laws of England are presumed to be the same as ours, until proof of the contrary is shown. (*Hickman v. Alpaugh*, 21 Cal. 227; *Hill v. Grigsby*, 32 Cal. 56, 60; *Brown v. San Francisco Gas Co.*, 58 Cal. 427, 428;² *Marsters v. Lash*, 61 Cal. 622, 624; *Loisla v. Superior Court*, 85 Cal. 11, 30;³ *Wickersham v. Johnston*, 104 Cal. 407, 411.⁴)

GRAY, C.—The action is based upon a judgment made and entered in favor of plaintiff against defendant in the Queen's Bench division of the high court of justice of the supreme court of judicature in England on the eleventh day of November, 1898, for the sum of one thousand four hundred and fifty-four pounds and four shillings. The plaintiff obtained judgment, from which the defendant appealed.

1. There was no demurrer to the amended complaint. The appellant attacks it however upon the ground that it fails to state facts constituting a cause of action, in that it contains no facts showing that the English court had jurisdiction of the subject-matter of the action or of the person of the defendant. The complaint contains the following allegations in this behalf: "That said Queen's Bench division of said high court of justice had jurisdiction of the subject-matter of said action and of the parties thereto." It also avers that said judgment "was duly given, made, and entered in and by" said court. Certainly, in the absence of a demurrer, this was

¹ 25 Am. St. Rep. 100.

² 99 Am. Dec. 421.

³ 20 Am. St. Rep. 197.

⁴ 43 Am. St. Rep. 112.

sufficient on the subject of jurisdiction in the English court. (*Dore v. Thornburgh*, 90 Cal. 64.¹)

The findings are, that all the allegations of the complaint are true, and hence the findings also sufficiently show the jurisdiction of the court in which the judgment here sued on was rendered.

2. The allegation of the complaint as to the value of the judgment is: "That upon said eleventh day of November, A. D. 1898 (the date of the English judgment), the value of said judgment . . . in lawful money of the United States of America was, to wit, seven thousand and fifty-five dollars." The complaint also alleged that no part of said judgment had been paid, and that the judgment remained "wholly unpaid and in full force and effect."

The law of England on the question of interest, as on every other question, will, in the absence of any showing to the contrary, be presumed to be the same as the law of this state. (*Wickersham v. Johnston*, 104 Cal. 407, at p. 411.²) The judgment being of a given value when rendered, is presumed to have drawn interest at the rate of seven per cent, and nothing having been paid on it, the value of the judgment at the date of the commencement of this action, as well as at the date of the judgment herein, was a mere matter of figures, to be calculated with mathematical certainty from the allegations of the complaint. The prayer of the complaint was for \$7,055, together with interest thereon at the rate of seven per cent per annum from said 11th of November, 1898, the date of the English judgment. The complaint was entirely sufficient as to allegations of value of the judgment, and the findings following it were also entirely sufficient and fully support the conclusions of law and the judgment herein for \$8,284.13, which judgment was properly calculated from the figures and allegations of the complaint, all of which were found to be true.

We advise that the judgment be affirmed.

Cooper, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Angellotti, J., Shaw, J., Van Dyke, J.

¹ 25 Am. St. Rep. 100.

² 43 Am. St. Rep. 112.

[S. F. No. 3028. Department One.—November 29, 1904.]

MARY S. ROHRBACHER, Appellant. v, JOHN R. AITKEN, and J. C. CULLEN, Respondents.

ACTION TO CANCEL NOTE—CONSIDERATION—FINDING—PRESUMPTIONS.—

In an action to cancel a promissory note for alleged want of consideration, the note must be presumed to have been executed for a sufficient consideration, and where the court found that there was a good and sufficient consideration therefor moving from the payee to the plaintiff, all presumptions are in favor of the finding of the court.

ID.—NOTE FOR SHORTAGE IN ESTATE OF DECEASED PERSON—DISMISSAL OF PROCEEDING AGAINST SURVIVING EXECUTOR.—Where the note of the plaintiff, payable in six months, was executed to the defendant as assignee of a three-fourths interest in the estate of a deceased person, of which plaintiff's deceased husband and a surviving executor were co-executors, in settlement of a shortage in the estate on the part of plaintiff's husband as executor, and in consideration of the dismissal of a proceeding legally instituted by the assignors of the payee, as heirs, to suspend the powers of the surviving executor, and to revoke his letters, such dismissal, after a full investigation of all the facts by plaintiff's attorney, was a sufficient consideration for the note.

ID.—COMPROMISE AGREEMENT, BY LITIGANTS FAVORED.—Where a legal proceeding has been instituted, and the parties, after investigation, in the absence of fraud, make a compromise agreement, on account of which the proceedings are dismissed, the dismissal is a consideration for the agreement, which cannot afterwards be made to depend upon the question whether or not the party could have prevailed in the proceeding. Such agreements, in the absence of fraud, are favored and sustained by the courts, because they put an end to litigation and tend to produce peace and good-will.

ID.—DUTY OF PLAINTIFF TO PERFORM AGREEMENT—GOOD FAITH AND HONESTY.—It appearing that plaintiff, having faith in her attorney, and wishing to save the reputation of her deceased husband, made the agreement and signed the note, under the circumstances of the case good faith and honesty require that plaintiff should keep the agreement she has made.

ID.—PRESENTATION OF CLAIM UNNECESSARY—PERSONAL OBLIGATION.—It was not necessary for the defendants to have presented any claim against the estate of the deceased husband of the plaintiff for his shortage as executor, the claim having been settled by the personal obligation of the plaintiff. If she desired the estate of her deceased husband to be alone responsible, she should have taken that position before she signed the note.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. M. C. Sloss, Judge.

The facts are stated in the opinion.

Reddy, Campbell & Metson, and Campbell, Metson & Campbell, for Appellant.

The note was without consideration, having been executed solely on account of her husband's shortage. (*Chaffee v. Browne*, 109 Cal. 211.) The surviving executor was not liable for the deceased executor's shortage, in which he took no part. (*Abila v. Burnett*, 33 Cal. 658, 667; *In re Sanderson*, 74 Cal. 199, 211; *In re Osborn*, 87 Cal. 1, 5; *Douglass v. Satterlee*, 11 Johns. 16, 21; *White v. Bullock*, 20 Barb. 91; *Davis v. Walford*, 2 Ind. 88; *Call v. Ewing*, 1 Blackf. 301; *Ray v. Doughty*, 4 Blackf. 115; *O'Neill v. Herbert*, 1 McMull. Eq. 495.)

John R. Aitken, for Respondents.

The note was supported by the agreement of compromise and settlement, and the dismissal of the case against the surviving executor, without regard to whether it was ultimately maintainable or not. (Beach on Contracts, secs. 175, 177; *Clark v. Turnbull*, 47 N. J. L. 265;¹ *Longridge v. Dorville*, 5 Barn. & Ald. 117; *Edwards v. Baugh*, 11 Mees. & W. 639; *Cooper v. Parker*, 14 Com. B. 118; *Morey v. Town of Newfane*, 8 Barb. 645; *Sigsworth v. Coulter*, 18 Ill. 204; *Grandin v. Grandin*, 49 N. J. L. 508, 510;² *Stewart v. Ahrenfeldt*, 4 Denio, 189; *Moon v. Martin*, 122 Ind. 211; Wharton on Contracts, sec. 533; *Bollin v. Metcalf*, 6 Wyo. 1;³ *Hale v. Akers*, 69 Cal. 160; *McClure v. McClure*, 100 Cal. 339; *Bank of Commerce v. Scofield*, 126 Cal. 156; *Chahoon v. Hollenback*, 16 Serg. & R. 425;⁴ *Peirce v. New Orleans etc. Co.*, 9 La. 397;⁵ *Smith v. Farra*, 21 Or. 405; *Fisher v. May*, 2 Bibb. 448.⁶)

COOPER, C.—This action was brought to obtain the cancellation of a promissory note upon the ground that the maker had received no consideration therefor and to enjoin the holder from attempting to realize upon certain shares of stock

¹ 54 Am. Rep. 157.

² 60 Am. Rep. 642.

³ 71 Am. St. Rep. 892.

⁴ 16 Am. Dec. 537.

⁵ 29 Am. Dec. 448.

⁶ 5 Am. Dec. 626.

pledged to him as security for said note. Upon the findings judgment was entered for defendants, and this appeal is from the judgment and order denying plaintiff's motion for a new trial.

The case turned upon the question as to whether or not there was a good and sufficient consideration for the note. The trial court found that "there was a good and sufficient consideration therefor moving from the said defendant, John R. Aitken, to the said plaintiff." The promissory note is presumed to have been executed for a sufficient consideration, and all presumptions are in favor of the finding of the court. We are of the opinion that the evidence supports the finding. Philip Rohrbacher, the husband of plaintiff, prior to his death, had been a joint executor with one Ehmann, of the will and estate of one Merz. After his death, in April, 1897, it was discovered that there was an apparent shortage on the part of deceased in the funds of the Merz estate of about five thousand dollars.

Defendant Aitken is the assignee of a three-fourths interest in the estate of Merz. In September, 1898, two of the heirs of the Merz estate, assignors of defendant Aitken, petitioned the court having jurisdiction to suspend the powers of the surviving executor, Ehmann, and to revoke his letters testamentary, and thereupon citation was issued and an order made "temporarily suspending the powers of the executors of said estate and directing said executors to show cause on the 12th day of September, 1898, why they should not be removed as executors of said estate."

Pending the hearing on the citation Mr. Louis F. Dunand, who was attorney for plaintiff in the estate of her deceased husband, had investigated the matter of the shortage in the Merz estate, and had been engaged in negotiations with Mr. Asher, the attorney for defendants, as to said shortage. Dunand testified: "She examined the figures, and I communicated the facts to Mrs. Rohrbacher. One day Emma Rohrbacher, a daughter, stated that she preferred that she, her two daughters and Mrs. Rohrbacher should pay the money by the execution of this note. . . . Mrs. Rohrbacher was the executrix of her husband's estate. . . . The lady and her child wished to pay the obligation of their father to the estate of Merz. . . . The daughter stated that she did not want

her papa to owe any money, that when any money came out of her father's estate she would be willing to contribute her share and Mrs. Rohrbacher stated that she would see the other sisters and that if they wished to contribute she would give us an answer. At the next interview they were perfectly satisfied. . . . Our conversations were with reference to settling the amount of the deficit. The note was signed four or five months after negotiations had been commenced."

Plaintiff testified: "I signed the note and agreement submitted to me. It was claimed that there was a shortage in the Merz estate, and as I didn't want any scandal, or anything, I thought if I got anything out of my husband's estate, and my daughters, we decided to settle that matter rather than to have any scandal."

Defendant Aitken testified. "The consideration for the note was the dismissal of the proceedings against Mr. Paul Ehmann—the waiving of the claim against him. The consideration was the dismissal of the citation against Ehmann."

Plaintiff was represented by her counsel in all the negotiations and investigations as to the shortage of her deceased husband as executor of the Merz estate. She consulted her daughters and fully investigated the matter. After such investigation, and with the consent of her attorney, she executed the note and agreement. The citation against the surviving executor, Ehmann, was thereupon dismissed and the matter regarded as settled. The defendants changed their position upon the faith of the note and agreement. It may be that now they would be unable to collect from the co-executor. Where legal proceedings have been instituted, and the parties, after investigation, in the absence of fraud, make a compromise agreement, and the proceedings are in consideration thereof dismissed, the dismissal of the proceedings constitutes a consideration for the agreement. The parties cannot afterwards make the agreement depend upon the question as to whether or not the party could have prevailed in such proceeding. If so, no compromise agreement would be valid. Such agreements, in the absence of fraud, are favored and sustained by the courts, because they put an end to litigation, and tend to produce peace and good-will. Plaintiff, having faith in her attorney, and wishing to sustain the reputation of her deceased husband, knowing all the facts, made

the agreement and signed the note. Good-faith and honesty now require that she keep the contract she has made. She made the contract and note in March, 1899. She did not commence this action until September, 1899. The action was not tried until May, 1901. It was not necessary for defendants to have presented a claim against the estate of plaintiff's deceased husband. The claim was settled by the personal obligation of plaintiff. If she desired the estate of her deceased husband alone to be responsible, she should have taken that position before she signed the note. The principles herein stated have been applied by the courts in many cases. They were applied in a case where the husband died leaving a note unpaid, and having transferred all his property to his wife, who in turn transferred it to her daughter, and the mother and daughter gave a new note to the creditor of the deceased husband (*Whelan v. Swain*, 132 Cal. 389), and where a note and mortgage had been executed by the husband and wife, the husband died and the claim of the mortgagee was proven against the estate, the wife and children executed a new note and mortgage upon the same property. (*Humboldt Sav. etc. Soc. v. Dowd*, 137 Cal. 408.) It was there said: "The mortgagors, after executing the note and mortgage, in extension of a debt which was a legal charge upon their property, will not now be heard to say that their act was without consideration. If their sense of right and justice does not impel them to pay the note so made by them, the court, as a matter of law, will compel them to pay it."

In *Connecticut Life Ins. Co. v. McCormick*, 45 Cal. 580, it was held that a mortgage executed by a married woman upon her separate property to secure money due and owing by her husband was valid. In the late case of *Farmers' etc. Bank v. De Shorb*, 137 Cal. 693, it is said: "It is the well-settled rule that a married woman may mortgage her separate property for the debt of her husband." (See, further, *Walker v. Dixon Crucible Co.*, 47 N. J. Eq. 342; *McNulty v. Cooper*, 3 Gill & J. 214; *Shipman v. Lord*, 58 N. J. Eq. 380.) We have carefully examined the case of *Chaffee v. Browne*, 109 Cal. 211, relied upon by appellant, and are not disposed to extend its doctrine beyond the facts therein stated, though it is not in conflict with what is here decided. There the mortgage was given by a married woman to secure

the pre-existing debt of her husband. No extension of time was given, and nothing was given up or surrendered. "The wife received nothing, the husband received nothing, the creditor parted with nothing." (As to the effect of *Chaffee v. Browne*, 109 Cal. 211, see *McDonald v. Randall*, 139 Cal. 252.) In this case the creditor parted with his right to pursue the proceedings instituted by his citation. Six months' time was given by reason of the note. The plaintiff kept the question as to her husband's shortage in his capacity as trustee from being openly investigated in such proceeding.

We advise that the judgment and order be affirmed.

Gray, C., and Harrison, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Shaw, J., Angellotti, J., Van Dyke, J.

[S. F. No. 3086. Department One.—November 29, 1904.]

**ABNER DOBLE COMPANY, Appellant, v. KEYSTONE
CONSOLIDATED MINING COMPANY, Respondent.**

APPEAL FROM JUDGMENT UPON CROSS-COMPLAINT—ABSENCE OF EVIDENCE AND EXCEPTIONS—PRESUMPTIONS.—Upon appeal by the plaintiff from a judgment rendered in favor of defendant upon its cross-complaint, where the record does not contain the evidence, and shows no objections or exceptions to evidence, all intendments are in favor of the judgment, and it must be presumed that sufficient evidence was introduced to justify the findings and judgment.

ID.—VARIANCE BETWEEN CROSS-COMPLAINT AND FINDINGS—CURE OF DEFECT BY DECISION—WAIVER OF OBJECTION—PRESUMPTION.—Where the cross-complaint claimed damages in a specified sum for breach of a contract with plaintiff, guaranteeing the efficiency of an air-compressor which plaintiff altered, and which was rendered worthless by the alteration, the damage alleged being for the value of its use in the condition in which it was before the alteration, and the court found damage in a less sum for expense incurred by defendant toward making the alteration, and for the cost of restoring it to its original condition, the variance and defect in the pleading must be deemed cured by the decision; and upon an appeal from the judgment, without the evidence, it must be presumed that the

damage found was duly proved at the trial, and that objection to the evidence on account of the variance, which might have been remedied by amendment of the cross-complaint was waived by the plaintiff.

12.—NON-PAYMENT OF NOTES—DEFECT IN CROSS-COMPLAINT SUPPLIED BY AVERMENTS OF PLAINTIFF.—The failure of the cross-complaint to aver non-payment of notes described therein is not fatal nor ground for reversal of the judgment, where it appears from plaintiff's complaint and bill of particulars, a copy of which was set forth in the answer of defendant, and from plaintiff's answer to the cross-complaint, that such notes were credited as payments upon plaintiff's account, without any claim of any item of payment to be applied upon such notes. Defects in a pleading may be cured by averments in the pleading of the opposite party.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. W. R. Daingerfield, Judge.

The facts are stated in the opinion of the court.

Jesse W. Lilienthal, and Frohman & Jacobs, for Appellant.

Edward Lynch, for Respondent.

VAN DYKE, J.—The plaintiff corporation sued the defendant corporation for the sum of \$1,527.29 as a balance due for work, material, and money which it furnished said defendant.

The bill of particulars furnished by the plaintiff to the defendant on its demand showed charges amounting to \$8,094.27 and credits for cash and allowances of \$6,566.98, leaving as a balance the amount sued for.

In the answer and cross-complaint filed by the defendant it is claimed that the charges in the bill of particulars aggregating \$4,752.93 were made for reconstructing and transforming the compressor at the Keystone Mine, and that this amount should be disallowed because the plaintiff did not fulfill its contract as to the efficiency which the compressor would have when transformed, as guaranteed by plaintiff, and its alteration had rendered the compressor worthless. It was further claimed by the defendant that the four promissory notes given by said defendant to the plaintiff, amounting to fifty-two hundred dollars, were so given upon a written

agreement that they would be applied upon the amount of goods sold and to be sold to the defendant mining company, and if they should overpay the amount due the plaintiff company the balance was to be repaid to the defendant company at its option, and the defendant alleges that these notes were negotiated and transferred by the plaintiff to the Anglo-Californian Bank, Limited, and that the defendant paid them, except seven hundred and fifty dollars, which it was liable for and would be compelled to pay. Defendant also claimed that it had been damaged to the extent of two thousand dollars by being deprived of the use of a compressor since its alteration, and in said amended cross-complaint defendant demanded judgment against the plaintiff for \$3,257.14, with legal interest thereon from May 14, 1895.

In its decision the court found in substance that the transformation of the air-compressor was a failure, and that the plaintiff did not in any particular comply with its contract in that regard, and that defendant advanced to plaintiff three promissory notes amounting to four thousand dollars on the agreement between the parties that the notes should be applied in payment on account for goods sold and to be sold to the defendant, and in the event that they overpaid the account, the balance was to be repaid to the defendant at its option. The court further found that the defendant owed the plaintiff \$3,375.09 for goods sold and delivered, and which were not connected with the compressor transaction, and that the defendant had paid and advanced to the plaintiff \$6,566.85, leaving a balance due defendant of \$3,191.89, which should be returned by plaintiff by virtue of the agreement between the parties already referred to, and that the defendant should have judgment for that amount with interest at the legal rate from May 14, 1895, together with the further sum of \$1,046, as damages sustained by the defendant through the failure of the plaintiff to perform its contract. On these findings judgment was entered accordingly on November 23, 1899, in favor of the defendant and against the plaintiff for \$5,203.89 and costs.

The plaintiff appealed from the judgment so entered December 8, 1899, upon the judgment-roll. The transcript thereof was filed in this court February 8, 1902. Plaintiff's opening brief on this appeal was filed April 15, 1902; re-

spondent's points and authorities May 23, 1902, and appellant's reply brief June 23, 1902.

In the points and authorities on behalf of appellant the greater portion is devoted to the consideration of the alleged error in awarding judgment to the defendant in excess of the amount demanded in the prayer of the amended cross-complaint. The prayer was for judgment in the sum of \$3,257.14, with legal interest thereon since May 14, 1895, amounting at the date of the entry of the judgment to the sum of \$4,289.65, whereas the judgment in fact as entered was for \$5,203.89.

By a supplement to the transcript herein, filed January 5, 1903, it appears that after the entry of the judgment under consideration the plaintiff moved for a new trial in the court below, whereupon said court, upon said motion coming on to be heard, granted an order that, unless defendant should consent to a reduction of the judgment to the sum of \$3,257.14, together with interest thereon at the rate of seven per cent per annum from May 14, 1895, and costs of suit, a new trial would be granted, and that defendant thereupon consented to such a reduction, and accordingly said superior court made and caused to be entered an order making said reduction in the judgment theretofore entered, and directing the clerk of said court to enter said reduction in the judgment-book and make appropriate reference to said correction, and that plaintiff's motion for a new trial was thereupon denied. The stipulation contained in said supplement to the transcript shows that the said reduction was thereupon entered in the judgment-book of said court on November 26, 1902, and on December 24, 1902, plaintiff filed and served its notice of appeal from said judgment as modified, and gave an undertaking on appeal in due form. And it was further stipulated that, in order to avoid the necessity of printing again the matter already appearing in the transcript filed on appeal from the judgment before its reduction, that said transcript might stand for the transcript on appeal from the judgment as reduced, together with the matter contained in the stipulation, and that it be considered together with the briefs already filed and the oral argument which counsel might desire to make, and that, as the superior court had already reduced the judgment to the amount demanded in the amended cross-complaint and answer, "the appellant withdraws his objection

to said judgment on the ground that it exceeded the amount demanded in the amended cross-complaint and answer, and which said objections are contained in points I and II of its opening brief, and no objections are made to the form of the order or manner of entry of the same reducing said judgment."

Point III of appellant's brief is the only remaining portion applicable to the appeal from the judgment as modified, and this is based upon the contention that the amended cross-complaint furnishes no basis for the judgment. It is objected on the part of appellant that there is a variance between the finding and the pleadings, in that it is alleged in the amended cross-complaint that the defendant was damaged in the sum of two thousand dollars, being the value of the use of the air-compressor in the condition it was prior to the making of the alteration by the plaintiff, whereas the finding is, that his damage was for money expended for railroad freight, costs of hauling material, brick, and for labor used in transforming the compressor, and for the cost of restoring it to its original condition. Further, it is claimed that there is no averment in the amended cross-complaint of the nonpayment of the sums of money claimed to be due defendant from plaintiff.

There is no bill of exceptions or statement brought up in the transcript. The respondent in his brief states that a bill of exceptions containing the testimony and part of the documentary evidence given at the trial—and some of an important character to respondent—was taken away from the clerk's office by the plaintiff in October, 1899, and by said plaintiff claimed to have been lost. However that may be, there is nothing now before the court showing that any objection or exception was made to any of the evidence introduced at the trial, and we must presume, therefore, that sufficient evidence was introduced to justify the findings and judgment, as all presumptions and intendments are in favor of the judgment. "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just." (Code Civ. Proc., sec. 469.) "No judgment, decision, or decree shall be

reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown." (Code Civ. Proc., sec. 475.) "It is unfair for a party to withhold an objection founded upon a defect, which, if pointed out in time, might be remedied, until it is too late to correct the defect, thereby inducing an opponent to rely upon his pleading as sufficient in order that he may have a fatal objection. Such course is a fraud upon justice and prevents a fair trial. It is therefore not tolerated." (*Greiss v. State Investment etc. Co.*, 98 Cal. 242.) In *Treanor v. Houghton*, 103 Cal. 54, it is said: "That the omission in the complaint would have been fatal in the face of a special demurrer is settled by the cases quoted *supra*, and by many others to which we might refer. The question, however, is, Can appellant after verdict raise the question here for the first time?" Then, after quoting from Chitty on Pleading, this court continues: "The difficulty experienced in many cases of this character is to determine whether or not the omitted fact or facts were proven at the trial. In the present instance we are met with no difficulty of this character. The cause having been tried by the court, and the facts found, it appears affirmatively by the record that what was omitted in the complaint was supplied without objection at the trial." And the same may be said in reference to the case at bar, as already stated. In Chitty on Pleading (vol. 1, p. 705), quoted in *Treanor v. Houghton*, the rule is stated as follows: "The second mode by which defects in pleading may be in some cases aided, is by intendment after verdict. The doctrine upon this subject is founded upon the common law, and is independent of any statutory enactments. The general principle on which it depends appears to be that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined

be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is *cured by verdict*. The expression *cured by verdict* signifies that the court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleadings was duly proven at the trial."

If the portion of the cross-complaint relating to the amount claimed to be due from the plaintiff to the defendant by reason of the three notes executed by defendant to the plaintiff for its accommodation is defective because of the failure to allege non-payment of the amount the defendant claims to be due, that defect is sufficiently disposed of by the original complaint, and the plaintiff's answer to the cross-complaint, taken in connection with the copy of the plaintiff's account set forth in the defendant's answer. These pleadings show that the plaintiff sues for a balance alleged to be due plaintiff on an account which includes as credits to the defendant the three notes referred to, they being credited as payments on the account; that they were accepted as payments, and that the plaintiff, in fact, claims that, after crediting the same, there still remained due plaintiff the balance sued for, and does not claim that there should have been any items in the account for any supposed payment of the amount claimed in the cross-complaint; in other words, that the plaintiff does not really claim that there ever was any such payment to be denied by a formal allegation of non-payment. The alleged error is therefore without substantial merit, and would by no means justify a reversal of the judgment. It is a familiar rule that defects in a pleading may be cured by averments in the pleadings of the opposite party. (*Vance v. Anderson*, 113 Cal. 536; *Daggett v. Gray*, 110 Cal. 172; *Schenck v. Hartford etc. Ins. Co.*, 71 Cal. 28; *Cohen v. Knox*, 90 Cal. 266; *Pomeroy on Remedies and Remedial Rights*, sec. 579.)

The judgment as modified is affirmed.

Shaw, J., and Angellotti, J., concurred.

Hearing in Bank denied.

[S. F. No. 3022. Department One.—November 30, 1904.]

C. R. KELLOGG, Appellant, v. R. E. DE B. LOPEZ, Respondent.

ACTION UPON NOTE—DEFENSE—ACCOMMODATION OF MAKER FOR PAYEE—FAILURE OF PROOF—EVIDENCE—ACCOMMODATION FOR CORPORATION.—In an action on a note which was taken up by the payee at a bank to which it was indorsed, and which was assigned by the bank to the plaintiff by the direction and for the use of the payee, a defense by the maker that he signed it for the accommodation of the payee wholly failed of proof, where the evidence showed that the maker, payee, and indorser of the note were stockholders in a corporation, and that the note was made and indorsed for the accommodation of the corporation, and was delivered to the corporation to be discounted for its use, and that the money was received and used by the corporation.

1A.—SURETYSHIP FOR CORPORATION—FORM OF INSTRUMENT DISREGARDED—CONTRIBUTION—RIGHTS AND OBLIGATIONS OF SURETIES INTER SECE.—Upon the facts of the case the form of the instrument may be disregarded, and the parties to the note are to be regarded as mere sureties for the corporation, and as such entitled to contribution from each other, and each surety in reference to the others, disregarding their common relation to the principal debtor, is primarily liable to them for his proportion of the debt, not as a surety, but as principal debtor, and his suretyship for the others applies only to the balance.

1B.—DEFENSE OF WANT OF CONSIDERATION—PROOF ONLY IN PART.—The facts in the case, as to joint suretyship for the corporation, though differing materially from the facts pleaded under the defense of accommodation for the payee, were admissible under the defense of want of consideration, which was proved only in part as respects the suretyship of the defendant in his relations to the payee and indorser as co-sureties, but failed in part as to his own primary liability for one-third of the note to the indorsee of the bank for the use of the payee who took up the note.

1C.—ACTION UPON EXPRESS PROMISE OF MAKER OF NOTE—LEGAL CAUSE OF ACTION TO EXTENT OF CONSIDERATION.—The suit brought is not for contribution merely, but is upon the express promise of the defendant, as maker, to pay the note, and there is a legal cause of action in such case to the extent to which there is a consideration for the note.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. John Hunt, Judge.

The facts are stated in the opinion.

Gavin McNab, for Appellant.

Chapman & Clift, and Martin Stevens, for Respondent.

SMITH, C.—Suit on a promissory note for the sum of fifteen hundred dollars, with interest, etc. The note runs from the defendant Lopez to H. F. Anderson as payee. It was indorsed by the latter to the Bank of British Columbia; and upon payment by Anderson was, by his direction and for his use, assigned by the bank to the plaintiff. The defense set up in the answer is in effect that the note was signed by Lopez for the accommodation of Anderson, and that it was without consideration. The verdict and judgment was for the defendant. The appeal is by the plaintiff from an order denying his motion for a new trial.

The principal question involved in the case is as to the sufficiency of the evidence to justify the verdict; with relation to which the defendant's answer may be regarded as setting up two defenses: The one, that he signed as security for Anderson only (Civ. Code, sec. 2832); the other, that there was no consideration for his promise (Civ. Code, sec. 1550). These defenses are in effect identical, but they rest on different principles, which should be distinguished.

With regard to the former, there was no evidence in the case tending to show that Lopez signed the note for the accommodation of Anderson. But the facts proven by the defendant were, merely: That Anderson and Lopez and one Stackpole were stockholders of the San Mateo Coursing Association, a corporation, and made and indorsed the note for the accommodation of the association; that this was done, in pursuance of an agreement to that effect, made at one time and as part of one transaction; that the note was then delivered to an agent of the association to be discounted for its use, and that the money was received and used by the association. Upon this state of facts it is clear, at least in this state, that in equity—where “the form of the instrument may be . . . disregarded”—the parties to the note are to be regarded as mere sureties of the association, and as such entitled to contribution from each other. (*Reynolds v. Wheeler*, 10 Com. B., N. S., 564; *McDonald v. Whitfield*, L. R.

8 App. Cas. 744-745; *Machado v. Fernandez*, 74 Cal. 362; *Leeke v. Hancock*, 76 Cal. 127; Civ. Code, sec. 2822. And see, also, *Deering v. The Earl of Winchelsea*, 2 Bos. & P. 271, 273; *Powell v. Powell*, 48 Cal. 236; *Norton v. Coons*, 3 Denio, 132; s. c. 6 N. Y. 33; 1 Story's Equity Jurisprudence, secs. 492-493; and Civ. Code, sec. 2848.) The case, therefore, differs materially from the case pleaded; and the question is thus suggested, whether the facts proven were relevant to the issue presented by the answer. For if not, there was—with regard to the allegation that the note was made for the accommodation of Anderson—a total failure of proof.

The solution of this question will depend upon the nature of the reciprocal rights and obligations of the sureties between each other—disregarding their common relation to the principal debtor. Thus viewed, in such a case as we are considering, each surety is primarily liable for his proportion of the debt, and for the balance, as surety for the others. (Civ. Code, sec. 2831; Bouvier's Law Dictionary, "Suretyship.") As to his own part of the debt, therefore, he is not, as to his fellows, a surety, but a principal debtor. Thus, in the case before us, Lopez, in terms, agreed to pay to Anderson or order the whole of the debt, but in effect his agreement was to pay, unconditionally, his proportion of it and the balance only upon the default of the others; and to the extent of his primary obligation, the note precisely expresses the promise. As to the balance of the amount named in the note, the proofs show that Lopez was surety only for Anderson and Stackpole, and hence, to that extent, the note is invalidated. But as to his principal obligation, the effect of the note is not varied, nor its validity affected. The facts proved were therefore relevant to the issue; and all that can be said is, that the defendant failed to prove his case in part,—that is to say, he proved only that he was surety for Anderson for a third of the debt, and for Stackpole for another third, but as to the remaining third he failed to make out his case.

The same result must also be reached if we consider the defense as a plea of want of consideration. As to two thirds of the note for which Anderson and Stackpole were primarily liable, there was no consideration moving to the defendant, and to that extent his promise was invalid. But as to his own part of the debt, the incurrance of like obligations by

Anderson and Stackpole constituted a "prejudice suffered, or agreed to be suffered [by them], as an inducement" for the defendant's promise, and was therefore a sufficient consideration. (Civ. Code, sec. 1605.)

The suit, it may be observed, is not a suit for contribution merely. It is a suit on defendant's express promise to pay, to which the defense interposed has either wholly or partly failed. The case, therefore, differs from the case of contribution between sureties who are such not only upon equitable principles, but by the legal effect of their contract. In the latter case the suit for contribution can be maintained in *assumpsit* on the implied contract by the surety satisfying the obligation; but, it is said, cannot be maintained by him as assignee of the original contract. But in a case like the present, on an express promise to pay, there is always, to the extent there is a consideration, a legal cause of action, which remains unaffected except to the extent that grounds for equitable relief are affirmatively shown by the defendant; and here the defendant has partly, if not wholly, failed to make out such equitable defense.

We advise that the order appealed from be reversed.

Gray, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is reversed.

Angellotti, J., Shaw, J., Van Dyke, J.

[Crim. No. 1157. Department One.—November 30, 1904.]

THE PEOPLE, Respondent, v. FRED MEAD, Appellant.

CRIMINAL LAW—FELONY—UNLAWFULLY PLACING WIFE IN HOUSE OF PROSTITUTION—INFORMATION—UNCERTAINTY—ABSENCE OF SPECIAL DEMURRER—ARREST OF JUDGMENT.—Under an information charging that the defendant, at the time and place stated, "did then and there, willfully, unlawfully, and feloniously connive at, consent to, and permit the placing and leaving" of his wife "in a house of prostitution" described, is sufficient to enable a person of common

understanding to know that it was intended to place her there for purposes of prostitution, and not in an innocent capacity as cook or seamstress. Any mere uncertainty as to the particular circumstances of the offense was waived by a failure to demur specially, and cannot be made the ground of a motion in arrest of judgment.

Id.—NEW TRIAL—DEFECT NOT AFFECTING SUBSTANTIAL RIGHT.—Where the evidence in the record shows that there was no pretense on the part of the prosecution that the defendant would be guilty if the wife was placed in the house of prostitution for innocent purposes, and the evidence for the prosecution tended to show that she was there for purposes of prostitution, and that defendant had knowledge of the purpose, and actively procured her to be there, the defendant was not prejudiced in any substantial right on the trial by the supposed defect in the information, which might have been seasonably remedied by amendments, if the proper objection had been made by demurrer before the trial, and such defect is not ground for a new trial or for reversal of the judgment.

Id.—EVIDENCE—CROSS-EXAMINATION OF WIFE—OTHER HOUSES OF PROSTITUTION—HOUSE KEPT BY SISTER—FEAR OF HUSBAND.—Where the wife of the defendant, who was a witness for the prosecution, testified on cross-examination by defendant's counsel that she had been an inmate of other houses of prostitution, including one at a particular place, a question asked by defendant's counsel as to whether the house at that place was kept by her sister was properly excluded as immaterial; and where at the time of the ruling there had been no testimony that she entered the house named in the information through fear of her husband, it cannot be said that the court erred in excluding the evidence as tending to show that she would be more likely to enter that house of her own volition, uninfluenced by such fear.

Id.—“HOUSE OF PROSTITUTION”—“CRIBS”—VERDICT NOT AGAINST LAW—INSTRUCTIONS—NEW TRIAL.—Where the evidence shows that the house in question contained twelve rooms, commonly known as “cribs,” each of which was occupied by a different woman as a place of prostitution for herself alone, and that the wife of the defendant occupied one of them for that purpose, it shows that defendant's wife was in “house of prostitution,” within the intent and meaning of the statute; and the verdict is not against law merely because the court instructed the jury that the house must be occupied by two or more women. Such instructions would not justify a new trial, the evidence being otherwise sufficient to justify the verdict.

Id.—MISCONDUCT OF DISTRICT ATTORNEY—PROOF OF MARRIAGE—COMMENT UPON EVIDENCE OF DEFENDANT.—Where there had been evidence on the part of the prosecution satisfactorily showing that a legal marriage had been performed, and the defendant had testified equivocally on that subject and denied the marriage, if at all, only by implication, it was not misconduct for the district attorney

to comment upon his failure expressly to deny that the woman who was placed in the house of prostitution was his wife.

ID.—APPEAL—INSUFFICIENT ARGUMENT.—A statement of defendant's counsel that the court erred in refusing defendant's proposed instructions, by numbers, with reference merely to the folios of the transcript, is not an argument justifying any consideration of errors supposed to be presented thereby.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

Frank J. Murphy, for Appellant.

U. S. Webb, Attorney-General, J. C. Daly, Deputy Attorney-General, and E. B. Power, Deputy Attorney-General, for Respondent.

SHAW, J.—The defendant was convicted of the crime of conniving at, consenting to, and permitting his wife to be placed in a house of prostitution, as defined by the act of 1891 (Stats. 1891, p. 285), and appeals from the judgment of conviction and from the order denying his motion for a new trial.

1. The first error that is assigned is the denial of his motion in arrest of judgment made upon the ground that the information is defective. The provisions of the act defining the crime, so far as applicable, are as follows: "Any man who connives at, consents to, or permits the placing or leaving of his wife in a house of prostitution, or allows or permits his wife to remain therein, shall be guilty of a felony," etc. The information charges that the defendant at the time and place stated "did then and there willfully, unlawfully, and feloniously connive at, consent to, and permit the placing and leaving of one Gertie Raymond Mead, then and there and at all times herein mentioned the wife of said Fred Mead, in a house of prostitution, situate," etc. The contention of the defendant is, that this statute is not to be construed literally so as to forbid a husband to place his wife in a house of prostitution, or permit her to remain therein, for an innocent purpose,—as a cook or seamstress, for instance,—but only to forbid the placing or leaving her therein for the purposes of

prostitution, and that when construed in this way the crime is not complete, unless it is alleged and proven that the wife was left in the house of prostitution with the intention on the part of the husband that she should herself act as a prostitute. It may be conceded for the purposes of this case that if the objection had been raised by demurrer for uncertainty the information would be fatally defective. But where there is no demurrer, and the defect is sought to be raised solely by motion in arrest of judgment, we think a different rule should prevail. Section 1185 of the Penal Code declares that an objection to the sufficiency of the information which is waived by failure to demur, will not be sufficient to justify an order for the arrest of judgment. Under the provisions of the code an information must state the acts constituting the offense "in such manner as to enable a person of common understanding to know what is intended" (sec. 950, subd. 2), and if it is sufficient to withstand this test it is not subject to attack either by general demurrer or by motion in arrest of judgment. (See, also, Pen. Code, sec. 959, subd. 6.) The words used are to be construed "in their usual acceptance in common language," except technical phrases defined by law. (Pen. Code, sec. 957.) We think it must be admitted that a person of common understanding, construing words according to their usual acceptance in common language, would understand that a man who was charged with "willfully, unlawfully, and feloniously conniving at, consenting to, and permitting" the placing of his wife in a house of prostitution was charged with placing her there for the purpose of prostitution, and not in the innocent capacity of a cook or seamstress. The words "willfully, unlawfully, and feloniously" must be given some effect in construing such language, and they certainly would exclude an act which by law was innocent. The utmost that can be said in criticism of this information, therefore, is, that it may not be direct and certain as to the particular circumstances of the offense. Such an objection is waived by a failure to demur. (Pen. Code, sec. 1012.)

A motion in arrest of judgment is made after the trial. In this case the record contains the evidence, and it shows that there was no pretense on the part of the prosecution that the defendant would be guilty if the wife was placed in the house

of prostitution for innocent purposes only. The chief effort of the prosecution was to show that she was there for the purposes of prostitution, and that the defendant had knowledge of the purpose, and not only passively consented thereto, but actively procured her to be there. If the defendant before the trial had presented a demurrer to the information, and had then urged the defect therein which he now suggests, there would have been an opportunity for the court to have directed an amendment of the information, curing the defect. Instead of raising the question at that point in the case, he seeks to gain an advantage by taking the chances of an acquittal upon the trial, and after conviction attempting to get a new trial by reason of the defect which he should have urged before. It is very clear that he was not in any respect prejudiced on the trial by the supposed defect in the information. Section 960 of the Penal Code provides that no information is insufficient, "nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits." And by section 1258 of the Penal Code this court must give judgment "without regard to technical errors or defects, . . . which do not affect the substantial rights of the parties." In view of these provisions we do not think the judgment should be reversed for the alleged defect in the information, even if we concede that the language used does not with certainty state all the facts constituting a public offense.

2. When the wife of the defendant was testifying as a witness the court refused to allow the defendant's attorney on cross-examination to ask if, prior to the time she went to the house in question in this case, she had not been an inmate of a house of prostitution at Martinez conducted by her sister. This ruling is assigned as error. The defendant's argument is, that the question was asked in order to show that she had previously been an inmate of a house of prostitution, and would therefore be more likely to enter the house in question of her own volition, without being influenced by fear of her husband. At the time the court made this ruling there had been no testimony that fear of her husband had caused her to enter the house of prostitution. Such testimony as there was

on the subject of fear was brought out by the defendant's counsel upon subsequent cross-examination. Therefore, we cannot say that the court erred in excluding the testimony. But the fact really sought to be elicited by the question was immaterial. Immediately before the question was asked the witness had testified that she had previously been in "quite a few" houses of prostitution, one of which was a house in Martinez, and the purpose of the question was manifestly to ascertain whether or not this house in Martinez was conducted by her sister. It having been shown that she had previously been in several houses of prostitution, the entire purpose for which the defendant contends had been accomplished, and the mere question whether or not the particular house in Martinez had been conducted by her sister was wholly immaterial.

3. It is contended that the verdict is against law, because the court instructed the jury that a house of prostitution is one in which "two or more women reside and engage in illegitimate sexual intercourse for money," and, further, "a single room may constitute a house of prostitution," and that the evidence shows that the defendant's wife occupied a single room alone. The theory is, that the state is bound by the definition of the law given by the court in its instructions, whether they be right or wrong, and that if the crime proven by the evidence does not measure up to the standard fixed by the court in its instructions, the verdict is against law, and there must be a new trial. We do not think it is necessary to decide whether this theory is correct or not.

The evidence shows that the house in question contained twelve rooms, commonly known as "cribs," each one of which was occupied by a different woman as a place of prostitution for herself alone, and that the wife of the defendant occupied one of them for that purpose. We hold that, under the circumstances, defendant's wife was in a "house of prostitution," within the meaning and intent of the statute under consideration, and hence the verdict was not against law. The fact that the court instructed the jury that the house must be occupied by two or more women would not justify this court or the court below in granting a new trial because there was no proof that a particular room of the house was occupied by more than one woman, if the evidence was otherwise sufficient to justify the verdict.

4. There is the usual claim that the rights of the defendant were prejudiced by misconduct of the district attorney in his closing argument. The misconduct consisted in commenting upon the alleged failure of the defendant to deny that the woman who was placed in the house of prostitution was his wife. Section 1323 of the Penal Code declares that the neglect or refusal of the defendant to be a witness cannot be used against him on the trial. It may be conceded that under this section in general it is not proper for the district attorney to comment on the effect of the failure of the defendant to testify upon any subject connected with the trial, although he may have been a witness and may have testified on other subjects. But the record in this case does not show that the defendant failed to testify on the subject, as his counsel claims. There had been testimony on the part of the prosecution satisfactorily showing that a legal marriage ceremony had been performed between the defendant and the witness Gertrude Mead, and that they had thereafter lived together after the manner of husband and wife. This was sufficient *prima facie* proof that they did sustain that relation. The defendant, while he did not testify expressly on the question whether or not they had been actually married, did testify to several circumstances which would justify the inference that they were living together meretriciously, and not as husband and wife. Thus, he testified that, after coming ashore from a man-of-war about May, 1900, he saw her in a saloon conducted by her sister, and that they had a few drinks together, after which he left her for a time and came back, and had some more drinks with her and went to bed; that he went with her to see her mother and visit her aunt, and was with her pretty much all night; that she said she had done wrong, and asked him to take her back again, promising to conduct herself like a lady and behave and lead a decent life, and that she thought it best for her to go back with him again, and that if he would take her back she would lead a different life; that he saw her again some five weeks later and went from her mother's home down town with her, where they met a man named Rogers, and the three of them went around town for several hours, drinking at several places, and that she again asked him to take her back, and that he promised her to take her back provided she would live decent and quit drinking; that she got

drunk that very night, and he was going to quit her again; that he engaged a room and stayed all night with her; that he rented a room with the intention of making her behave herself, and that after they commenced living together, she behaved herself about a week, and then began carousing and drinking, and the next thing he knew she was in a crib; that he had not had anything to do with her for about three weeks previous to his arrest. Under this testimony the jury might have inferred either that he was taking her back to live with him again as a paramour, or that as a husband he was condoning her offense and taking her back to live with him as his wife. Under this very equivocal testimony of the defendant himself, if there was any contention on the part of the defense that the defendant was not her husband, there was no impropriety in the district attorney commenting upon the fact that he had made no express denial of the fact. If the jury should take one of the possible inferences, the effect would be, that he had, by his testimony as a whole, denied by implication that she was his wife. If the other inference were adopted, the effect would be that his testimony would be considered as an admission of their marital relations. The prosecution was justified in calling the attention of the jury to the vague character of his testimony on the subject, and the absence of an explicit denial.

5. The last point made by the defendant is as follows: "The court erred in refusing defendant's proposed instructions Nos. 3, 6 and 7 (folios 40 to 44 inclusive)." We cannot dignify this portion of the brief by styling it an argument. It does not justify any consideration of the errors supposed to be presented thereby.

The judgment and order are affirmed.

Angellotti, J., and Van Dyke, J., concurred.

[Sac. No. 1275. In Bank.—November 30, 1904.]

In the Matter of the Estate of CHARLES TRAVER, Deceased. MARY E. BURK et al., Appellants, v. LOTT D. NORTON et al., Respondents.

ESTATES OF DECEASED PERSONS—WILL—UNDEVISED REAL ESTATE—EXPENSES OF ADMINISTRATION.—Where a testator, whose whole estate consisted of realty, devised only one half thereof, without making any provision in the will for payment of the debts and expenses of administration, or appropriating any part of his estate therefor, the burden of such debts and expenses must be borne wholly by the undevised portion of his real estate as to which he died intestate.

ID—CONSTRUCTION OF CODE—INSUFFICIENCY OF APPROPRIATION IN WILL.—Section 1560 of the Code of Civil Procedure is intended to apply where there is an ample and sufficient appropriation in the will for debts and expenses; and section 1562 of the same code is intended to apply to all cases of insufficient appropriation in the will, no matter from what the insufficiency may spring, whether because the appropriation was too small, or because no appropriation was made.

APPEAL from a decree of the Superior Court of Sacramento County distributing the estate of a deceased person. Peter J. Shields, Judge.

The facts are stated in the opinion of the court.

Albert M. Johnson, and Hiram W. Johnson, for Appellants.

Arthur C. Huston, for Russell Day, Jr., Respondent.

S. Solon Holl, for Other Respondents.

LORIGAN, J.—Charles Traver died in Sacramento County in 1901, leaving a will made August 5, 1897. At the time this will was made, his wife was living, and by its terms he bequeathed all his property to her during her life. He then provided, after reciting that all the property was community property, and that the will was only intended to convey that portion of it over which he had testamentary capacity, that “at the death of my wife, it is my will that one half of the property hereby given, devised and bequeathed to my wife

during her lifetime, shall descend and go to Lott D. Norton, Charles T. Norton and Russell Day, Jr., in equal proportions." And then further provided that, "If my wife dies before I do, in that event I give, devise and bequeath one half of the whole of my property to Lott D. Norton, Charles T. Norton, and Russell Day, Jr., or in the case of the death of either of them, to their heirs by right of representation."

These were the only provisions of the will disposing of his estate.

The testator's wife died before he did, the effect of which was to vest in him the entire community property, only one half of which was disposed of under his will; as to the other half he died intestate, leaving as his heirs at law to succeed to the same, among others, the appellants George W. Traver, a brother, and Mary E. Burk, the daughter of a deceased sister.

The will was duly admitted to probate, the estate consisting solely of real property. In due course of administration a petition for distribution came on for hearing, and the court determined thereon that the testator had made testamentary disposition of but one half of his estate, and that as to the other half he had died intestate. It accordingly distributed one half thereof to the respondents as devisees under the will, and the other half to the appellants, and others, as his heirs, according to the law of succession, but further decreed that all the debts of deceased, and the expenses of administration of the estate, should be borne by, charged to, and paid by that portion of the estate which the testator had not disposed of by his will, and which had descended to these appellants, and others, as his heirs at law, thus exempting the portion of the estate devised by the will to the respondents from the payment of any of these charges.

It is from this latter portion of the decree that this appeal is taken by some of the heirs at law, and the correctness of the decree of the court charging the undivided portion of the estate with the payment of the debts and expenses of administration is the only question presented for determination, and must be solved by an examination of the provisions of our codes upon the subject.

While our attention is directed to sections 1562 and 1643 of the Code of Civil Procedure, and to section 1359 of the

Civil Code, as bearing upon the question, we are of the opinion that the matter is settled by the provisions of section 1562 of the Code of Civil Procedure, considered in connection with section 1560 of the same code.

The other sections referred to—while applicable to some extent—are not directly to the point, and are discussed by counsel upon both sides, more particularly upon the question whether expenses of administration are to be treated as included within the debts of the estate referred to in these sections.

But under the construction which we think must be given to the sections 1560 and 1562 of the Code of Civil Procedure, cited above—particularly the latter—we do not think it of any moment to a determination of the main point in controversy on this appeal to discuss that question, or to consider the other sections at all.

It is provided by section 1560, above referred to, that if the testator makes provision by his will, or designates the estate to be appropriated for the payment of his debts, expenses of administration, or family expenses, they must be paid according to that provision, or out of the appropriated estate as far as the same is sufficient.

Section 1562 provides that: "If the provision made by the will, or the estate appropriated therefor, is insufficient to pay the debts, expenses of administration, and family expenses, that portion of the estate not devised or disposed of by the will, if any, must be appropriated and disposed of for that purpose, according to the provisions of this chapter."

The testator, Traver, made no provision by his will for the payment of the debts, or expenses of administration, nor did he designate, or appropriate, any portion of his estate for that purpose. The will in no manner referred to any of these matters. It was entirely silent upon the subject. Now, as we construe the sections just referred to, according to the first, permission is granted to the testator to himself declare by his will what portion of the estate should be used for the payment of the enumerated charges, and the property so designated shall be devoted to that purpose.

By the second, if insufficient appropriation is made, the law makes the selection, and the undevised portion of the estate

must be appropriated, or disposed of, for that purpose. Both sections deal with the same subject-matter,—namely, the payment of debts, expenses of administration, and family expenses,—and in declaring what portion of the estate shall be used for that purpose, contemplate the existence of either of two general conditions—an ample appropriation for that purpose by the testator, or insufficient appropriation. And while it is true that section 1562 speaks of an “insufficient” appropriation, we do not think that the section should be construed so as to hold that it could only apply in cases where the testator had actually made some, but still an inadequate, appropriation of property from which to make payment. This, in our judgment, would be placing too narrow and restricted an interpretation upon the section, and one not in harmony with the apparent purposes of its enactment. The main purpose of this section apparently is to fix the class of property which shall be disposed of to meet payment, from whatever cause the necessity for its disposition arises, whether from inadequate appropriation for that purpose, or on account of an entire failure of appropriation.

Section 1560 was intended to apply where ample and sufficient appropriation had been made in the will, and, in our opinion, section 1562 was intended to apply in all other cases, no matter from what the insufficiency sprung; whether because the appropriation was too small, or because there was none made.

The fair meaning of the language of the section that, “If the . . . estate appropriated therefor is insufficient to pay its debts, expenses of administration,” etc., resort shall be had to that portion of the estate undisposed of for their payment, is that where no estate is appropriated by will, or that which is appropriated is inadequate, such resort shall be had. Where a will fails to make any appropriation to pay the debts and charges against the estate, there is clearly an insufficient appropriation for that purpose. The absence of all appropriation is certainly an insufficient one.

We are of the opinion that the court properly charged the debts and expenses of administration against the property undisposed of by the will and which descended and was distributed to the appellants as heirs at law of the testator, and the decree appealed from is thereby affirmed.

McFarland, J., Angellotti, J., Shaw, J., Van Dyke, J., and Beatty, C. J., concurred.

[S. F. No. 3909. In Bank.—November 30, 1904.]

JOSEPH FRITTS, Appellant, v. S. W. CHARLES, Respondent.

WRIT OF MANDATE—ARREST FOR MISDEMEANOR—APPLICANT NOT INTERESTED.—An applicant for a writ of mandate to compel the arrest of a person accused by his complaint, filed in the justice's court, of a misdemeanor in unlawfully using a slot machine for a game of chance, is not a party beneficially interested, within the meaning of the statute. He is not injured thereby in any manner different from the general public, and his application for such writ was properly denied by the superior court.

APPEAL from a judgment of the Superior Court of Santa Clara County. Hiram D. Tuttle, Judge.

The facts are stated in the opinion.

U. S. Webb, Attorney-General, and James H. Campbell, District Attorney, for Appellant.

S. W. Charles, Respondent, *in pro. per.*

Louis O'Neal, and Owen D. Richardson, *Amici Curiae*.

COOPER, C.—Defendant is a justice of the peace in Palo Alto Township, in Santa Clara County. Plaintiff filed an affidavit with said justice in which he alleged that a misdemeanor had been committed by one Levin, by unlawfully playing and conducting a "certain game played with a device known as a slot machine, said machine being supplied with a certain amount of money, and being operated by placing therein a nickel and turning a crank, the person placing said nickel therein securing thereby a chance of getting a much larger sum of money from said machine upon turning said crank."

The defendant refused to issue a warrant for the arrest of Levin, for the reason that in his opinion, as justice aforesaid,

the said criminal complaint or affidavit did not state facts sufficient to show that any public offense had been committed. Thereupon this application was made to the superior court for a writ of mandate to compel the defendant as justice to issue a warrant for the arrest of Levin. The court denied the application for the writ, and plaintiff prosecutes this appeal from the judgment.

It is not necessary to pass upon the question as to the sufficiency of the complaint in the justice's court. The writ of mandate will not be issued except upon affidavit on the application of the party beneficially interested. (Code Civ. Proc., sec. 1086.) The plaintiff is not the party beneficially interested within the meaning of the statute. If a misdemeanor has been committed, the law provides machinery for the arrest and prosecution of the party who committed the misdemeanor. If the officers of the law fail to do their duty where the rights of the public are involved, the law provides a remedy in such case. It is the settled rule that a private individual can apply for this remedy only in those cases where he has some private or particular interest to be subserved, or some particular right to be preserved or protected by the aid of this process, independent of that which he holds with the public at large.

In *Marini v. Graham*, 67 Cal. 130, the petitioner asked for a writ of mandate to compel the superintendent of public streets to abate an alleged public nuisance. The writ was denied, and the court said in speaking of the rights of the applicant: "The facts upon which he relies as the basis of his action to enforce an alleged private right in himself, affirmatively show that the obstruction in the sidewalk of which he complains is not more injurious to himself than it is to the inhabitants at large. Any injury or annoyance which he suffered from it may be greater in degree, but it is not different in kind from that sustained by the public; therefore, he receives from it no special injury for which he is entitled in law to a private action . . . or in a special proceeding to obtain a writ of mandate." (See, also, *Linden v. Alameda County*, 45 Cal. 6; *Ashe v. Board of Supervisors*, 71 Cal. 236; *People v. Budd*, (Cal.) 47 Pac. 594; *Mitchell v. Boardman*, 79 Me. 469.)

In this case there is nothing to show that operating the machine in which a person by placing a nickel therein "secures a chance of getting a much larger sum of money from

said machine upon turning said crank" injures plaintiff in any manner different from the general public. He is not compelled to put a nickel in the machine and turn a crank, but if he should do so, according to the complaint, he "secures a chance of getting a much larger sum from the machine."

The judgment should be affirmed.

Harrison, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Van Dyke, J., Angellotti, J., Shaw, J.,
Lorigan, J., Henshaw, J., McFarland, J.

Rehearing denied.

[S. F. No. 2894. Department One.—December 1, 1904.]

J. W. MASON, Respondent, v. ISIDORE LIEVRE, Appellant.

SALE OF STOCK—ACTION FOR PURCHASE MONEY—OFFER AND ACCEPTANCE.—DIRECTION FOR DRAFT—SETTING APART OF STOCK—DELIVERY.—An action may be maintained for the purchase price of certain shares of the stock of a corporation sold by plaintiff to the defendant, where it appears that, as the result of correspondence, there was a complete offer and acceptance for the purchase and sale thereof, with direction to the plaintiff to draw upon the defendant for the purchase money, without direction as to delivery, and that the plaintiff complied with such direction and set apart the stock for the use of the defendant, and requested information as to the mode of its issuance, and tendered the stock thereafter within a reasonable time. In such case there was a completed sale of the stock, as to which an immediate delivery was not essential.

10.—REVOCATION BEFORE DELIVERY—ABSENCE OF AGREEMENT AS TO TIME.—There having been no agreement as to the time of delivery of the stock, and the contract of sale having been complete before delivery, the contract bound both parties, and the defendant could not revoke the contract before actual delivery and tender of the shares within a reasonable time, on the ground that they did not accompany the draft.

11.—TRANSFER OF STOCK—IDENTIFIED SHARES—PASSAGE OF TITLE.—Where the vendor had complied with what was required on his part, and it only remained for the vendee to designate as to the mode of transfer of the stock, which was ready for immediate delivery, and it is evident that if the stock had been delivered

immediately to the vendee in San Francisco, it must have been returned to Honolulu for transfer on the books, if desired, the request for an intimation of such desire did not affect the passage of the title to the identified shares of stock sold, which were set apart by the vendor to the use of the vendee.

Id.—**SUFFICIENCY OF FINDINGS—PROBATIVE AND ULTIMATE FACTS—CONCLUSIONS OF LAW.**—Where the findings are in part of probative facts and in part of ultimate facts, and findings of ultimate facts appear in the conclusions of law, they may all be considered in determining whether they are supported by sufficient evidence, and are sufficiently responsive to the issue made by the pleadings, and support the judgment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion.

M. S. Eisner, and Reinstein & Eisner, for Appellant.

Oliver Ellsworth, for Respondent.

CHIPMAN, C.—Plaintiff sues to recover the sum of \$1,040, the alleged purchase price of five hundred shares of the Olaa Sugar Company stock, which he claims to have sold to defendant. The cause was tried by the court without a jury, and plaintiff had the judgment. The appeal is from the judgment and from the order denying defendant's motion for a new trial.

The alleged contract of sale is found in certain letters passing between plaintiff and defendant which, with some explanatory circumstances and facts, constitute the evidence in the case. Plaintiff resided at Hilo, Hawaiian Islands, and defendant resided at San Francisco. Both were merchants and had had some previous dealings in sugar stock on an occasion when plaintiff was in San Francisco. Plaintiff testified that "the particular transaction involved in this suit was carried on altogether through correspondence." On May 19, 1899, plaintiff wrote defendant the following letter:—

"Hilo, H. I., May 19 1899.

"Mr. ISIDORE LIEVRE, 215 Market Street, San Francisco, Cal.

"My Dear Sir:—I have not yet had time to write you fully as I would like, and to-day being mail-day, you can readily

understand my having so much to attend to after a long absence, and will not be able to write you about anything by this mail, except the Sugar Company.

"Before this stock was issued in Honolulu on last Monday, I saw it selling at \$1.00 premium, which was 50 per cent on the amount paid in. I was very sorry that I could not do better by you than I did, consequently feel disposed to assist you in any way that I can. On my arrival at Hilo, I found that the subscribers here had not paid up their assessments for the allotment at Hilo, and that it had been subscribed for three times over, but we are compelled to send the assessments down by this steamer at the latest, and already I find that some of the subscribers are not able to pay up for as much as they subscribed for, and we have no discretion but to have them pay up or cut off their subscription, so there will be some stock left unpaid for. In which event, although it is at a premium, under the circumstances as above described, I will be willing to let you have what I can of it under exactly the same conditions as I took it over, for I shall pay up the assessment of ten per cent and the stamp duty myself to-day for whatever may be left over, and will allot you some of it if you write me you desire it. The only additional cost to you will be another four cents per share additional for the transfer. In other words, you will pay ten per cent on the par value, and eight cents per share stamp duty, which includes the stamp duty I paid, and the one that will be on your stock. Let me hear from you by next mail, as I cannot hold it very long for you, as there are many people here now who want to subscribe, but who have not their names on the list, and they will be glad enough to pay even a premium on the stock.

(Signed) J. W. MASON."

The par value of the stock was twenty dollars per share. On May 31, 1899, defendant wrote plaintiff in reply as follows:—

"SAN FRANCISCO, May 31, '99.

"J. W. MASON, Esq., Hilo, H. I.

"Dear Sir:—Confirming my letter of even date, I am now in receipt of your favor of the 19th inst., and would state that I appreciate your kindness in the matter. I will take up to five hundred shares of the assessable stock on the basis mentioned by you, namely, payment of first assessment plus eight

cents stamp duty per share. As to the amount of same, you can draw on me at one day's sight for the amount.

"Respectfully yours,

ISIDORE LIEVRE."

Subsequently plaintiff received a letter from defendant dated June 13, 1899, reading as follows: "I confirm my previous letter concerning the amount of assessable stock I am willing to take, namely, five hundred shares (500). I would like to ask you to kindly give me information as to what the Olaa Sugar Company is doing."

On June 21, 1899, plaintiff wrote defendant in reply to his letter of May 31st as follows:—

"June 21, 1899.

"Mr. ISIDORE LIEVRE, 215 Market Street, San Francisco, Cal.

"Dear Sir:—I have your two favors of the 31st ult., which seem to have been delayed in some way, and note the inclosed copy of your letters to Messrs. Bishop & Co. and B. F. Dillingham.

"I note that you will take up to five hundred shares of assessable stock on the basis mentioned in my letter of the 19th of May, so I am making draft on you as per your request, through our agents, Messrs. Alexander & Baldwin, at one day's sight, for the sum of \$1,040.00, which is the first assessment, and eight cents per share stamp duty. Write me how you want the stock issued, and I will have it sent to you by the company.
(Signed) J. W. MASON."

No other letters were written by plaintiff in reply to the above letters of defendant. It takes about nine or ten days, as testified, for a letter to go from San Francisco to Hilo; delays of three or four days sometimes occur at Honolulu.

Plaintiff testified that immediately upon receiving defendant's letter of May 31st (which was about June 13th) he set aside five hundred shares of the sugar company stock for defendant, and on June 21st drew on defendant for the amount mentioned in the correspondence. His agents, Alexander & Baldwin, through whom he drew, were at Honolulu. The draft was presented about July 5th and payment refused, but for what reason was not stated at the time of refusal, so far as appears. Plaintiff testified: "I allotted and set aside that amount of stock to him. I had a certain amount of stock that

I had subscribed for, as Mason, trustee, for the benefit of my San Francisco friends, and Mr. Lievre was one of them, and others I can name to whom I wrote just such letters. I heard from Mr. Lievre as to how many he would take, and I set aside that amount for him. I awaited a reply from him as to how I should have the stock made out; that is the only reason I did not have that [referring to the certificate of stock] sent to him, attached to the draft." Further explaining this omission to send the certificate with the draft, he testified that it was "because he did not tell me how it was to be allotted. In my previous transactions with him he had taken stock in their names"—presumably other persons. At the time plaintiff received defendant's letter of May 31st, he held over four thousand shares, some in his own name and others in his name as trustee. On July 3, 1899, defendant wrote plaintiff as follows: "I hereby revoke my offer to take five hundred shares of assessable stock. I have this day written to my agent at Honolulu, J. C. Cohen, full instructions as to same, and if you go to Honolulu you can interview him, and he will fully explain the matter to you, or if you do not go, he will communicate with you direct as to the same."

After defendant had refused to accept the first draft, he wrote plaintiff on July 8th in which he stated that the stock was for a friend who would have taken it, notwithstanding it had fallen off in value, if it had been attached to the draft, "for," defendant wrote, "I would have been in a position to show him that the order for cancellation did not reach in time, and that in the mean time the stock had been delivered, and he would be bound to pay for same."

The court found on sufficient evidence that defendant's letter of July 3d "was mailed and received by plaintiff subsequent to the writing, mailing, and receipt of the aforesaid letters of May 19th and May 31, 1899 (plaintiff's letter and defendant's reply), and subsequently to the writing and mailing of the letter of June 21, 1899" (plaintiff's letter drawing on defendant). After receiving this July 3d letter plaintiff wrote his agents at their Honolulu office July 20th, sending them five hundred shares of the sugar company stock, with directions to have it reissued in the name of defendant, and this certificate bearing the date July 25th, accompanied by a second draft on defendant for the amount first drawn for, was

sent forward to the San Francisco office of Alexander & Baldwin, and there is evidence that upon its being received the draft with the certificate attached was presented to defendant and acceptance refused.

Upon these facts, some of which are specifically found, the court, as conclusions of law, found that plaintiff's letter of May 19th was an offer to sell five hundred shares of the stock in question, at the price stated therein; that defendant's letter of May 31st was an acceptance of the offer and an agreement to buy this number of shares at said price; that by plaintiff's letter of June 21st he only notified defendant that he (plaintiff) had made a draft on defendant for the purchase price; "that the writing, mailing and receipt of the said letters of May 19th, May 31st, and June 21st constituted a written executed contract of sale by plaintiff to defendant" of said shares for the sum named, and "that on the presentation of plaintiff's said draft on defendant . . . and the refusal by defendant to accept the said draft, the said sum of \$1,040 became thereupon due and owing, by defendant to plaintiff"; and, as a further conclusion of law, that plaintiff is entitled to judgment against defendant for the sum named with interest and costs of suit.

Defendant claims that plaintiff's letter of May 19th was not a sufficient offer to sell five hundred or any other number of shares of stock, owing to its indefiniteness, and that the only definite offer in the entire transaction was defendant's letter of May 31st, which could be, and was, withdrawn before the plaintiff legally accepted it. By legal acceptance defendant means and insists that there must have been delivery of the shares at the time the first draft was presented for acceptance, and as it is conceded that the shares were not then tendered, he had a right to refuse acceptance. Furthermore, that as defendant withdrew his offer, of which plaintiff had notice, before sending his second draft, accompanied by the shares, the transaction was at an end, and he rightly refused acceptance of the shares.

It may be conceded that the letter of May 19th alone lacks in some respects the element of distinctness and certainty essential to a complete offer to sell. But whatever of uncertainty there may be on the face of this letter as to the company referred to or as to the number of shares offered, its meaning

was well understood by defendant, as shown by his letter of May 31st, in which he definitely offered to take five hundred shares, and by plaintiff's letter of June 21st in reply. By these several letters the minds of the parties were brought into perfect agreement. It is noticeable, and defendant comments on the fact, that the name of the company is not mentioned in the May 19th letter. This is true of defendant's letter of May 31st and also plaintiff's letter of June 21st, but defendant does not deny, nor can it be doubted, that both parties knew what stock was referred to, for in defendant's letter confirming his letter of May 31st he asks for "information as to what Olaa Sugar Company is doing."

It seems to us too obvious to call for discussion that when defendant made his offer to take five hundred shares in response to plaintiff's letter, also authorizing plaintiff to draw on him for the money, and plaintiff thereupon advised defendant that he had drawn on him as requested by defendant, an executed written contract resulted from the correspondence. If the parties had been strangers to each other defendant might with greater reason claim that the stock should have accompanied the draft, and might also have assumed that the shares would come with the draft. On the other hand, as friends, between whom at least one similar deal had occurred, as well as some others, plaintiff might well have assumed that defendant did not expect the stock to be sent with the draft, especially as defendant did not request it to be so sent. There must have been some understanding outside the letters, or defendant would not have known to what plaintiff referred in his letter of May 19th; and this would seem quite probable from the fact that plaintiff in writing defendant desired to know how he wanted the stock issued. Plaintiff had paid for the stock just what he was getting for it, although it was then worth a premium; there was no profit to him in the transaction, but it was rather a matter of accommodation to defendant. We do not think that plaintiff failed to send the stock because he intended to reserve, as defendant urges, the *jus disponendi*, or that the transaction had that effect. In our opinion, plaintiff's letter of June 21st was such a closing of the sale as to have given defendant a right of action for the stock. Indeed, as we understand defendant's position, he does not rely on his retraction of July 3d so much as on the fact

that the stock should in any event have been tendered with the presentation of the draft. Undoubtedly, this would be true if defendant had so directed, for it would then have been one of the express provisions of the contract. But he did not so direct, and the question arises whether it was necessary to a completed sale. Apart from the consideration that, in view of all the facts, plaintiff was not required to send the stock with his draft, as might under some circumstances have been the case, we do not think delivery of the shares was essential to the completed sale. This was not the ordinary sale of goods for cash or "cash on delivery" in which payment of the purchase price and the delivery of the goods are conditions precedent to vesting title, nor does it come within the class of cases known as a "trade offer," and may readily be distinguished from *Hilmer v. Hills*, 138 Cal. 134, cited by defendant. Such is the rule generally as to executory contracts, but there was here no condition that the price should be paid before delivery; on the contrary, plaintiff set aside the stock to defendant's use on receipt of his letter and drew on him precisely as directed. It was then too late for either party to retract; the sale was complete and the contract executed. The intention to sell and the intention to buy are both clear and unmistakable from the written expressions of the parties, and whatever significance might attach to the acts of payment and delivery would be in the nature of evidence, and not as of the essence of the contract. But if there remained some doubt on the question of intent from evidence conflicting in its nature, which we do not think there was, the finding of the court must stand. Even where there has been a manifestation of intention, Mr. Benjamin states the rule to be, that "the presumption of law is that the contract is an actual sale, if the specific thing is agreed on, and it is ready for immediate delivery." (Benjamin on Sales, 7th ed., sec. 311.) Where the goods have not been specified, or if, when specified, something remains to be done to them by the vendor, either to put them into deliverable shape, or to ascertain the price, the contract is executory. In this latter case, it is presumed that the parties intended to make the transfer dependent upon the performance of the thing yet to be done, as a condition precedent. (Ibid.) "But," it is added, "of course these presumptions yield to proof of a contrary intent." (Ibid.)

Here there was nothing remaining to be done by the vendor. He had shares in his own name and as trustee, which could have been delivered. The thing remaining to be done was for the defendant to designate how he wanted the shares issued. The cases in which the contracts were held to be incomplete because something remained to be done by the seller before delivery could be made according to the contract, "are those where that which remains to be done is something in order to the ascertainment of the price, or to the identification of the property sold, or where the contract is executory, as where the article sold has yet to be manufactured, such a contract being more strictly an agreement to sell, than a contract of sale." (*Tyson v. Wells*, 2 Cal. 122.)

It was said in *Hatch v. Oil Co.*, 100 U. S. 124: "Standard authorities also show that where there is no manifestation of intention, except what arises from the terms of the sale, the presumption is, if the thing to be sold is specified and it is ready for the immediate delivery, that the contract is an actual sale, unless there is something in the subject-matter or attendant circumstances to indicate a different intention."

Mr. Cook states the law thus: "Generally a sale of stock is attended with an immediate delivery of the certificate therefor, or it is agreed that the certificate shall be delivered at some specified time in the future. If, however, the vendor offers to sell his stock and the vendee accepts the offer, the contract is complete and binds both parties, although nothing has been said as to the time when the certificate of stock shall be delivered. The law implies that the contract will be performed by a delivery of the certificates immediately or within a reasonable time and either party may insist upon carrying out the contract." (Cook on Stock and Stockholders, sec. 334.)

The office of the sugar company was at Honolulu, and had plaintiff sent defendant the shares with the draft it would have been necessary for defendant to return them to Honolulu for reissue in his name, if he had desired them to so issue. The rule of our code is, that "The title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not." (Civ. Code,

sec. 1140.) If title passes in such a case, it cannot be that delivery of the thing, simultaneously with payment, is necessarily of the essence of the transfer. (See the subject discussed somewhat in *Lassing v. James*, 107 Cal. 348.)

It is contended that the findings are not responsive to the issues; that there is a failure to find on material issues; and that the ultimate facts pleaded in the complaint do not necessarily follow from the probative facts found.

After what has been said as to the transaction and the liability under what is undisputedly the contract between the parties, we do not deem it necessary to examine at length the objections to the character of the findings or as to whether they conform to the issues. They are findings in part of probative facts and in part ultimate facts, and the conclusions of law are in part more findings of ultimate facts than conclusions of law. We may look to all these to determine whether they are supported by sufficient evidence and are sufficiently responsive to the issues made by the pleadings and support the judgment.

We have examined appellant's points on the objections raised and his argument in support thereof and respondent's reply thereto, and we find no prejudicial error in respect of any of the objections made.

It is advised that the judgment and order be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Van Dyke, J., Angellotti, J., Shaw, J.

[S. F. No. 3910. Department Two.—December 1, 1904.]

THOMAS G. JONES, Appellant, v. J. B. WALDEN, Administrator, etc., Respondent.

ESTATES OF DECEASED PERSONS—ALLOWANCE BY ADMINISTRATOR—PART OF CLAIM—REJECTION OF RESIDUE—PRESENTATION TO JUDGE—STATUTE OF LIMITATIONS.—The allowance of a claim only in part by the administrator is a rejection of the residue; and if an action

is not begun within three months thereafter, it is barred by section 1498 of the Code of Civil Procedure, notwithstanding it is begun within three months from the approval by the judge of the part allowance made by the administrator. Such claim need not have been presented to the judge, whose action was not necessary to the completion of the rejection by the administrator, and could not affect such rejection.

ID.—PRESENTATION OF CLAIM—REJECTION BY JUDGE OR ADMINISTRATOR—RUNNING OF STATUTE.—It is only where a claim has been allowed by an administrator that it must be presented to the judge, who may reject it notwithstanding such allowance. A claim may be conclusively rejected by either the administrator or the judge; and where there is rejection by either the statute begins to run from the date of such rejection.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. M. C. Sloss, Judge.

The facts are stated in the opinion of the court.

A. Ruef, for Appellant.

Frisbie & White, for Respondent.

McFARLAND, J.—This is an action against the administrator of the estate of James B. Chase, deceased, to recover \$12,180.75 alleged to have been owing from said Chase at the time of his death to plaintiff upon an open, mutual, and current account. Judgment went for defendant and plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The court below held that appellant's alleged cause of action was barred by section 1498 of the Code of Civil Procedure; and we do not see how this conclusion can be successfully assailed. That section is as follows: "When a claim is rejected either by the executor or administrator, or a judge of the superior court, the holder must bring suit in the proper court against the executor or administrator within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim shall be forever barred." The facts which make this section applicable to the case at bar are these: "Appellant's claim for the \$12,180.75 having been presented to the administrator, the

latter, on January 16, 1902, allowed the same for only \$343.58, and on said day indorsed his allowance for that amount upon the claim. Afterwards, on February 20, 1902, the judge of the superior court indorsed on the claim a similar allowance for the sum of \$343.58. This present action was commenced May 6, 1902,—which was more than three months after the said indorsement of the claim by the administrator, but within three months after the said indorsement of the claim by the judge of the superior court.

The allowance of the claim by the administrator for \$343.58 was clearly, in law, a rejection of all the rest of the claim. (*Consolidated Nat. Bank v. Hayes*, 112 Cal. 75, 83.) And as the rejection occurred on January 16, 1902, the three-month limitation prescribed by section 1498 commenced to run from that date. The contention that the action of the superior judge on February 20th was necessary to the completion of the rejection is not maintainable. The language of the section is, that when a claim is rejected “*either by the executor or administrator, or a judge of the superior court*” suit must be commenced within three months after “the date of its rejection.” When an administrator rejects a claim the rejection is complete and final, and cannot be changed or in any way affected by any future action of the judge. In such case there is no reason for presenting a claim to the judge at all; and it is only where a claim has been allowed by an administrator that there is a necessity of presenting it to the judge, for he may reject it, notwithstanding its allowance by the administrator. But a claim may be conclusively rejected by either the administrator or the judge; and when there is a rejection by either the statute commences to run from the date of such rejection.

The judgment and order appealed from are affirmed.

Lorigan, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 2899. Department One.—December 2, 1904.]

H. F. KREDO, Respondent, v. O. B. PHELPS et al., Appellants.

ACTION FOR INJUNCTION—THREATENED OUSTER—THREATENED TRESPASS TO PERSONAL PROPERTY.—An action will not lie to restrain a mere threatened ouster of the plaintiff from rooms alleged to be in his possession where there is nothing to show that the threatened injury would be irreparable. Nor will an injunction lie to restrain threatened injury to plaintiff's furniture and the threatened removal thereof from the premises.

Id.—FINDINGS AND JUDGMENT UNSUPPORTED BY PLEADINGS.—The plaintiff must recover, if at all, upon the cause of action alleged, and not upon some other which may be developed in the proofs. Where the complaint alleges that plaintiff was in the quiet and peaceable possession of the premises, and there was no cross-demand or claim for rent, findings showing an ouster from the premises and a judgment that he be restored to possession, and should pay defendant a certain rent for the premises, are wholly unsupported by the pleadings and outside of the issues.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Thomas F. Graham, Judge.

The facts are stated in the opinion.

D. E. Alexander, and E. Myron Wolfe, for Appellants.

P. B. Nagle, and Nagle & Nagle, for Respondent.

COOPER, C.—Appeal from judgment in favor of plaintiff. Appellants contend that the complaint does not state facts sufficient to constitute a cause of action, and that the findings are outside of the issues stated in the pleadings. Both contentions will have to be sustained.

The substance of the complaint is: That at all times therein named the plaintiff "was in the quiet and peaceable enjoyment of a certain two rooms in a certain house known and designated as No. 937 Post Street in the city and county of San Francisco. . . . That while plaintiff was in the possession of said rooms, the said defendants wrongfully and unlawfully

threatened and do now threaten to oust plaintiff therefrom. . . . That plaintiff is informed and believes and therefore alleges that the said defendants threatened to prevent the said plaintiff from entering said premises by locking the doors of said house and by barricading the same so that it will be impossible for the said plaintiff to enter said rooms, and to unlawfully and wrongfully use force and violence against the said plaintiff if he shall attempt to enter said premises, and plaintiff further alleges, upon his information and belief, that the said defendants threatened to cause his said furniture to be unlawfully and wrongfully destroyed and removed from said premises and otherwise injure said plaintiff and his said property in violation of said lease and the terms thereof. That plaintiff believes that said defendants will commit said acts hereinbefore set forth unless they are restrained by this court."

The complaint concludes with a prayer for an injunction restraining the threatened acts and restraining the defendants "from interfering with the plaintiff in the quiet and peaceable enjoyment of said premises." It is evident that the object of the complaint is to enjoin the threatened ouster of plaintiff from his rooms and the threatened destruction of his furniture. It is alleged that defendants threatened to oust plaintiff from the said rooms and to cause his furniture to be destroyed and removed from the said premises. It is not even alleged that defendants will, unless restrained by the court, commit the threatened acts, but it is alleged that plaintiff believes "that defendants will commit said acts." If we regard the "two certain rooms" as being real estate, and sufficiently described, yet it is alleged that plaintiff is in the quiet and peaceable possession of them. Courts will not issue an injunction to prevent a threatened ouster of one in the possession of real estate when that is the main question before the court. If the party should be ousted, he would have his remedy at law, but the aid of a court of equity cannot be invoked to prevent a mere threatened ouster. If such were the rule the time of the courts would be taken up in the investigation of imaginary wrongs and idle threats. And so of the threatened destruction of plaintiff's furniture. We know of no case in which the court has enjoined the threatened injury or removal of ordinary personal property simply upon

allegation or proof of a mere threat to injure or remove it. There are cases of continued trespass, or of trespasses of such a nature that they will ripen into an easement, or of threatened destruction of property of peculiar value, and other cases where the facts show that the threatened injury will be irreparable, in which courts will grant injunctions, but not in a case of the threatened destruction of furniture. If an injunction could be granted in this case, there is no reason why it should not be granted in case of every threatened trespass either to person or property. We see no reason to depart from the old and well-established rule that an injunction will not lie to prevent a threatened trespass.

In the findings there is much immaterial matter as to the plaintiff's lease of the rooms, the tender of rent by him, and other matters, but it is found that defendants locked the front door leading to plaintiff's room, and "with great force refused to permit plaintiff to enter said premises." The court gave judgment that plaintiff is entitled to be restored to the possession of the said premises, and that defendants be "enjoined from in any way interfering with the said plaintiff in the occupancy of the said premises," and that "plaintiff should pay defendants \$10 for the rent of said premises." The court thus in effect found that plaintiff had been ousted from the possession of the premises and that he be restored to the possession, and this in face of the complaint alleging that he was in the quiet and peaceable possession and the absence of any demand in the complaint for possession. And the ten dollars rent is ordered to be paid by plaintiff to defendants in the absence of any cross-demand or claim as to any rent due. Courts have been very liberal in sustaining the findings of the trial court upon issues that were attempted to be made by the pleadings, and treated as so made during the trial, where they were of such a nature as to show some legitimate relation to the nature of the action as set forth in the pleadings. But they have not adopted a rule that would in effect do away with all pleadings. They have not held that a plaintiff could recover upon a different cause of action developed on the trial by the evidence with no amendment of the pleadings. They have not held that a plaintiff could recover possession of real estate upon a complaint which alleged that he was in possession and failed to allege any ouster. The rule is, that the

plaintiff must recover, if at all, upon the cause of action set out in the complaint, and not upon some other which may be developed by the proofs. (*Schirmer v. Drexler*, 134 Cal. 134. and cases cited therein.)

The judgment should be reversed.

Harrison, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is reversed.

Angellotti, J., Shaw, J., Van Dyke, J.

[Sac. No. 1270. In Bank.—December 3, 1904.]

D. W. HARRIER, Respondent, v. H. A. BASSFORD, Executor, etc., et al., Defendants; IDA C. BASSFORD and J. M. BASSFORD, Appellants.

EXECUTION—ISSUANCE UPON JUDGMENT AFTER FIVE YEARS—EX PARTE MOTION.—Under section 685 of the Code of Civil Procedure, as amended in 1895, the court may, upon *ex parte* motion of the judgment creditor, authorize the issuance of execution upon a judgment rendered since the passage of the amendment, notwithstanding the lapse of five years from the date of the judgment.

ID.—RUNNING OF STATUTE UPON JUDGMENT.—A judgment, as a cause of action, does not become final until the lapse of six months from the date of its entry, and it cannot be barred by limitation until the period of five years and six months after its entry.

ID.—CONSTITUTIONAL LAW—POWER OF LEGISLATURE—ABSENCE OF NOTICE—DUE PROCESS OF LAW.—The legislature has power under the constitution to permit the issuance of an execution upon motion of the judgment creditor without notice to the defendant. Such notice is not necessary to constitute due process of law, which is sufficiently obtained by service of the summons in the original action.

ID.—JUDGMENT UPON JOINT NOTE—SURETYSHIP—RELEASE OF PRINCIPAL DEBTOR—KNOWLEDGE OF OBLIGEE.—Where, so far as appears as to the obligee, a note is a joint obligation, the judgment rendered thereon must bear the same character, and a release of one of them does not operate to extinguish the liability of the other. But conceding, without deciding, that after judgment upon such a note it may be shown that one of the joint makers was in fact surety for another, such showing cannot avail where it is not shown that the obligee was aware of the relations between the debtors.

ID.—APPRAISEMENT OF HOMESTEAD—FILLING VACANCY IN BOARD OF APPRAISERS—NOTICE.—Where the appraisers appointed to appraise the homestead, a portion of which was subject to execution, were properly appointed upon due service of notice, and the absence of one of the qualified appraisers from the county created a vacancy, the court had authority to fill the vacancy with a qualified appointee without further notice.

APPEAL from orders of the Superior Court of Solano County. A. J. Buckles, Judge.

The facts are stated in the opinion of the court.

E. E. McFarland, Raleigh Barcar, and William M. Sims,
for Appellants.

John M. Gregory, L. G. Harrier, and T. T. C. Gregory, for
Respondent.

SHAW, J.—The defendant Ida C. Bassford appeals from an order of the superior court giving leave to issue an execution on a deficiency judgment entered against her in the action, also from an order denying her motion to set aside the first-mentioned order, and the proceedings taken thereunder, also from an order approving the report of the appraisers appointed to appraise her homestead in proceedings, in accordance with the Civil Code, to sell the same, on the execution, and from an order confirming the report of said appraisers setting apart such homestead.

On July 5, 1898, the plaintiff recovered a judgment of foreclosure against certain defendants, including the appellant Ida C. Bassford. The judgment provided that if the proceeds of the sale should not be sufficient to satisfy the judgment a deficiency judgment should thereupon be entered against certain of the defendants, including the said Ida C. Bassford, for the amount remaining unpaid. Thereafter a sale was had, and there being a balance of \$3,280.06 unpaid, a deficiency judgment was entered, as provided in the judgment of foreclosure. On October 12, 1903, upon motion of the judgment plaintiff, and without notice to any of the defendants, the court ordered that an execution issue upon the deficiency judgment for the amount due thereon, less the sum of four hundred dollars, previously paid. Thereafter an exe-

cution was issued in pursuance of the order, and the orders appealed from thereupon followed.

The order directing the execution to be issued was made under the provisions of section 685 of the Code of Civil Procedure, which reads as follows: "In all cases, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings; but nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the passage of this act."

This section was enacted in its present form, so as to make it applicable to judgments for the recovery of money, on March 9, 1895. The proviso to the effect that it was not to be construed to revive a judgment for the recovery of money is inapplicable to this case, inasmuch as the judgment herein was rendered after the enactment of the section as amended, and therefore it could not have been barred by limitation at the time of the passage of the amended section. Moreover, at the time this execution was issued, the judgment in question was not barred by the statute of limitations. As a foundation for a cause of action it did not become final until six months from the date of its entry. In the case of *Feeney v. Hinckley*, 134 Cal. 470,¹ it was held that an action upon a judgment is not barred until five years have elapsed from the time at which it became final. Adding to the five years provided in the statute of limitations the six months in which an appeal may be taken, and which must elapse before the judgment becomes final, it will be seen that the judgment of foreclosure would not be barred by limitation until the period of five years and six months after its entry. This period had not expired at the time the execution in question was issued.

The principal contention of the appellants is, that section 685, in so far as it may be construed to permit an order to be made for the issuance of an execution, upon motion without notice to the defendants, is unconstitutional. We think there is no merit in this contention. The legislature has the undoubted power to provide that an execution may issue on a judgment at any time after its entry or rendition. It may

¹ 86 Am. St. Rep. 290.

make the period five years, twenty years, or any other definite time, or it may make the right to an execution unconditional for five years, and leave it optional with the court to make it upon motion for an indefinite period thereafter. The latter is the course which has been pursued by our legislature. If this be within the legislative power, it must be equally competent for it to declare that such motion may be made without notice. If it could have fixed the time at twenty years in the first instance, or left it without limitation, it is certainly no greater exercise of power to make the right, after the first five years, dependent upon the permission or *ex parte* order of the court.

There is nothing in the terms of section 685 of the Code of Civil Procedure which expressly requires the service upon the defendant of a notice of the time and place of making the motion for leave to issue the execution. Ordinarily, process of any kind may be issued without any notice to the opposite party, and the general rule is that notice of application therefor need be given only where there is some statute expressly prescribing it. Such notice is not necessary to constitute that due process of law which is guaranteed by the constitution of the United States. The due process of law there guaranteed is obtained by the service of summons on the defendants or their subsequent appearance in the action before judgment. Perhaps in some cases circumstances may appear which would make it an abuse of discretion to make such an order without notice, or which would make it imperative to vacate the order on motion or reverse it on appeal. But no such conditions are shown. We cannot say that the order for the execution is invalid for want of previous notice of the motion.

It is claimed that the court abused its discretion in ordering the execution, and that the motion of the defendants to set aside the order should have been granted, upon the statement made in the affidavit filed by the appellants in support of the motion, to the effect that the appellant Ida C. Bassford was a surety on the original obligation, and that J. M. Bassford, senior, was the principal therein, and that subsequent to the entry of the deficiency judgment the estate of J. M. Bassford, senior, then deceased, was released from said deficiency judgment in consideration of the sum of four hundred dollars. It is claimed that this operates to release the

judgment as against the sureties also. The affidavit, however, does not show that the obligee had any notice whatever of the alleged fact that J. M. Bassford, senior, was the principal and Ida C. Bassford a surety on the note upon which the judgment is founded. So far as appears, as to the obligee the note was a joint obligation, and the deficiency judgment must bear the same character. Under the provisions of section 1543 of the Civil Code, a release of one of two or more joint debtors does not extinguish the obligations of any of the others. Conceding, but not deciding, that in any case where a joint, or joint and several, obligation is reduced to judgment, and it is subsequently made to appear that one of the judgment debtors was only a surety as to the other in the original obligation, a release of the principal will discharge the obligation as to the surety, we are satisfied that the principle cannot be applied in cases where it is not shown that the obligee, at the time of the release, was aware of the relations between the debtors.

Objection is made to the confirmation of the report of the appraisers and to the subsequent proceedings, on the ground that, it having been shown that one of the appraisers first appointed was not present in the county, another appraiser was substituted in his place, without additional notice to the defendants.

The court was authorized to appoint the appraisers in the first instance, upon the proof made of service upon the defendants of a copy of the petition and notice of the time and place of hearing, as provided in sections 1248 and 1249 of the Civil Code. The absence of one of the appraisers from the county caused a vacancy in the board of appraisers. We think the court had authority to appoint another person without further notice. Either party would, of course, have the right to move the court to vacate such appointment or set aside the report of appraisers, upon a reasonable showing that such appointee was unfit, incompetent, or disqualified. The appellant does not claim that he was in any respect an unfit or improper person, nor that he did not possess the qualifications required by the code. Upon the showing made, therefore, we do not think the point has substantial merit.

We find no error apparent in the proceedings appealed from. The orders are affirmed.

Beatty, C. J., Angellotti, J., Van Dyke, J., and McFarland, J., concurred.

[S. F. No. 309. Department Two.—December 5, 1904.]

PARKE & LAUY COMPANY, Respondent, v. SAN FRANCISCO BRIDGE COMPANY, Appellant.

ACTION FOR COMMISSIONS—SECURING CONTRACTS WITH FOREIGN GOVERNMENT—PAST AND FUTURE SERVICES—SUFFICIENCY OF COMPLAINT—TRIAL—OBJECTION UPON APPEAL.—In an action by the plaintiff corporation to recover commissions under an alleged contract which recited past services rendered by plaintiff through its agents in Guatemala in securing contracts for the defendant corporation with the government of Guatemala, and that such contracts are likely to be awarded, and agreeing to pay five per cent commissions on all moneys received under any contract or contracts awarded to the defendant, either direct or through any other person or contractor, said commissions to be in full compensation for past and future services to be rendered by the corporation plaintiff, which "agreed to continue its efforts to secure the said contracts, and to do everything in its power towards this end,"—where the complaint alleged that the contracts were thereafter awarded to defendant, and that one half of the commissions remained unpaid on amounts received thereafter, the mere failure to allege that plaintiff complied with its agreement to continue its efforts to secure the contracts, etc., is not ground for reversal upon appeal, where there was no demurrer, and the case was tried upon the theory that the fact of such continued efforts was in issue. [Beatty, C. J., dissenting.]

ID.—ISSUE AS TO WANT OF CONSIDERATION—EVIDENCE—REBUTTAL—CORRESPONDENCE.—Where the defendant had pleaded want of consideration for the alleged contract, and had introduced evidence tending to show that the plaintiff had done nothing in the matter of procuring the contracts, it was proper in rebuttal to admit evidence of a correspondence of plaintiff with its agents in Guatemala, the letters to whom were shown to the defendant and in great part dictated by it, which correspondence covered a period both before and after the date of the contract, and also to admit testimony that other letters were written pertaining to one of the contracts which were in court, subject to plaintiff's inspection though not formally introduced in evidence.

ID.—GENERAL QUESTION AS TO CONSIDERATION—RULING NOT PREJUDICIAL.—It was not prejudicial error to sustain plaintiff's objection to a general question asked by defendant of a witness, whether the defendant ever received any consideration for the written agree-

ment, where the witness had already testified that plaintiff had not paid or given defendant anything before or at the time of the agreement, and it appeared the only question before the court touching the consideration was as to plaintiff's services in procuring the contracts from Guatemala.

Id.—PAST SERVICES AS CONSIDERATION FOR CONTINGENT COMPENSATION UNDER WRITTEN CONTRACT—DOCTRINE INAPPLICABLE.—The general doctrine that a past executed consideration supports only an implied agreement to pay *in presenti* on request, and will not support an agreement to pay in future, has no application where the agreed compensation was to be contingent upon the securing of contracts, and by the written agreement of the parties they merely put into permanent written form what they finally agreed upon as to the future contingent compensation.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William R. Daingerfield, Judge.

The facts are stated in the opinion of the court.

R. Percy Wright, for Appellant.

The judgment is not supported by the complaint, which does not allege performance of the contract on the part of the plaintiff. (*Barron v. Frink*, 30 Cal. 486, 489; *Peasley v. Hart*, 65 Cal. 522, 524; *Hoy v. Hoy*, 44 Ill. 469, 471; *Hunter's Admrs. v. Miller's Exrs.*, 6 B. Mon. 612, 614; Chitty on Pleadings, 16th Am. ed., pp. 329, 331.) An executed past consideration will not support an express agreement different from the legal implication. (Civ. Code, sec. 1606; *Hopkins v. Logan*, 5 Mees. & W. 257; *Elderton v. Emerson*, 6 Com. B. 160, 174; *Discoria v. Thomas*, 3 Q. B. 234.)

H. A. Powell, for Respondent.

The allegation of the award to the defendant involves, by necessary inference, all facts necessary to accomplish that result, which is sufficient in the absence of a special demurrer. (*Reynolds v. Hosmer*, 45 Cal. 616; *Himmelman v. Spanagel*, 39 Cal. 401; *Tehama County v. Bryan*, 68 Cal. 59; *Mullaly v. Townsend*, 119 Cal. 52; *Russell v. Mixer*, 42 Cal. 478.) The defendant has paid half the commissions due under the contract, and cannot dispute its validity as to the residue. (*Main v. Casserly*, 67 Cal. 127; *Gribble v. Columbia*

Brewery Co., 100 Cal. 71.) Section 1606 of the Civil Code and the cases cited by appellant in connection therewith have no application to the facts here appearing.

McFARLAND, J.—This is an action to recover of defendant seventeen hundred and fifty dollars, alleged to be the balance due of a commission of five per cent on seventy thousand dollars, arising out of the written contract between plaintiff and defendant set out in the complaint. Judgment went for plaintiff as prayed for; and from the judgment and the order denying a motion for a new trial the defendant appeals. Each party is a corporation.

The written contract above mentioned was executed on the twenty-fourth day of April, 1896. It recites that plaintiff, "party of the first part," through its agents, Richardson & Kelton, in Guatemala, has been acting as agent for the defendant, "party of the second part," to secure to the latter a contract with the government of Guatemala for furnishing a hydraulic dredge, and also a contract for the dredging in whole or in part of the harbor of Istapa for said government, and that said contracts are likely to be awarded to the party of the second part. The contract then proceeds as follows:—

"Now, therefore: In consideration of the services already rendered by the party of the first part, and such further services as it may render in the matter, and for other good and valuable consideration, the party of the second part hereby agrees that in the event that the said contracts, or either of them, are awarded to the party of the second part, either direct or through any other person or contractor, it, the said party of the second part, will pay unto the party of the first part a sum equal to five (5) per centum of the total gross moneys received by the party of the second part on account of said contract or contracts. Said payments to be made to the party of the first part as payments are made to the party of the second part, and are to be in full compensation to the party of the first part for its time, trouble and expense in respect to the said contracts.

"The party of the first part agrees to continue in its efforts to secure the said contracts for the party of the second part, and to do everything in its power towards this end."

It is then averred in the complaint that the said contracts

were awarded to defendant by the government of Guatemala on or about the twenty-ninth day of July, 1896; that defendant has received on said contracts the sum of seventy thousand dollars, and had paid one half of the said five per centum thereon,—to wit, seventeen hundred and fifty dollars,—and no more, and has refused to pay any of the balance thereon; and judgment is prayed for the seventeen hundred and fifty dollars remaining unpaid. The court found these averments to be true, and rendered judgment for the plaintiff for the balance of seventeen hundred and fifty dollars; and the evidence amply supports the findings.

The answer contains an averment that the agreement of plaintiff was to influence the officers of the government of Guatemala corruptly, or in some improper way, and it seems to be contended by appellant that on account of this contemplated improper influencing of said officers the contract was void as being against public policy; but the court found that this averment was not true, and the finding is fully justified by the evidence.

Appellant contends for a reversal of the judgment upon the ground of the insufficiency of the complaint, because, as is claimed, there is no averment that after the execution of the written contract on June 24, 1896, respondent complied with its agreement to "continue in its efforts to secure the said contract." It is doubtful if such an averment was necessary, considering the fact that, after what respondent had already done, it was to receive the five per centum if the contract should be secured, "either direct or through any other person or contractor." But, at all events, the case was tried as if the fact of the continued efforts of respondent was at issue, and appellant introduced a considerable amount of evidence tending to show that respondent had not done anything of value toward securing the contract from the government of Guatemala after the date of the contract between appellant and respondent of April 24th. There was no demurrer to the complaint. There was an objection made by appellant to a letter offered in evidence by respondent, because it was dated after April 24, 1896, but that was in rebuttal, and after the appellant itself had introduced evidence tending to show that respondent had done nothing after that date. We think that as to this point the case is within the rule cited in numerous

decisions, that when a case had been tried on the theory that a certain issue was before the court, the point that the issue had not been properly presented in the pleadings will not be heard on appeal.

There was no error in admitting certain correspondence between respondent, who resided in San Francisco, and its agents, Richardson & Kelton, at Guatemala. Appellant had introduced evidence to the point that respondent had done nothing in the matter of procuring contracts from Guatemala; and the ruling of the court was, that the letters were admissible, not as evidence of the truth of their contents, but merely as acts tending to refute the evidence of appellant that respondent had done nothing about the matter of procuring the contracts. Moreover, these letters were shown to appellant, and answers from respondent to its agents at Guatemala were in great part dictated by appellant. This correspondence both before and after the twenty-fourth day of April was admissible; for in the answer it was denied that there was any consideration whatever for the contract, and appellant's evidence had been to the point that respondent had not done anything in the premises either before or after the date of the contract. For the same reason it was not error to admit testimony that other letters were written pertaining to the dredging contract, although the letters themselves were not formally introduced. They were in court subject to appellant's inspection.

There was no prejudicial error in sustaining respondent's objection to the general question asked by appellant of a witness, whether the appellant ever received "any consideration for the agreement of April 24, 1896." The witness had already testified that the respondent had not paid or given appellant anything either before or at the time of said agreement; and there was no pretense by respondent that there was any consideration for the contract other than its alleged services in procuring the dredging contracts from Guatemala. Therefore, the only question before the court touching the consideration was as to respondent's said services; and each party had full opportunity to present its evidence on that issue, and the appellant could not have been prejudiced by the ruling.

Appellant contends that even if respondent rendered any

services before the execution of the written contract of April 24th, they were past services and did not furnish any consideration for appellant's promise to pay in the future five per centum of the moneys which should be received from Guatemala; but we do not think that this contention is maintainable. It goes upon the theory that a past executed consideration will not support any promise different from that which the law implies—which is a promise to pay *in praesenti*, on request, and that an executed consideration will not support a promise to pay *in futuro*. Whatever may be said of this rather abstruse doctrine, it is not applicable to the case at bar. Here, as appears from the testimony, it was not expected that the respondent was to receive any compensation unless the dredging contracts were secured; and by the contract of April 24th the parties merely put into a permanent written form what they then finally agreed upon as to the future contingent compensation.

There are no other points calling for special notice, and we see no reason for reversing the judgment or the order denying a new trial.

The judgment and order appealed from are affirmed.

Lorigan, J., and Henshaw, J., concurred.

A rehearing in Bank was denied January 4, 1905, upon which Beatty, C. J., rendered the following dissenting opinion:—

BEATTY, C. J.—I dissent from the order denying a rehearing and from the judgment.

The complaint was fatally defective on general demurrer for want of facts in failing to allege performance by plaintiff of its stipulation to continue its efforts to secure the contract, and want of facts is a defect never waived by failure to demur. Nor was the action tried or even decided upon any understanding or assumption that continued effort on the part of plaintiff was an issue in the case. If it had been, the burden of proof was on the plaintiff; but it closed its case in chief without a word of evidence on the point, resting upon the theory of the complaint and of the argument here,—viz., that the mere award of the contract, with or without effort on the part of the plaintiff, entitled it to the five per cent. The best

proof of this is the fact that there is no finding by the court of anything more than the bald allegation of the complaint. The judgment, in short, is not only unsupported by the complaint, but equally without support in the findings.

If, as assumed in the opinion of the Department, the issue was imported into the case by the act of the defendant in introducing evidence to the effect that no services were rendered after the execution of the contract, then there was a material issue as to which the evidence was conflicting and no finding upon it. How can a judgment be sustained without any finding upon a material issue?

[S. F. No. 3097. Department Two.—December 10, 1904.]

CHARLES MARTIN, Appellant, v. JULIA BARRY, Respondent.

TROVER—CONVERSION OF HAY—NONSUIT.—A motion for a nonsuit was properly granted in an action of trover for the alleged conversion of hay belonging to the plaintiff where the evidence, construed most strongly against the defendant, failed to connect the defendant with the taking or use of the hay.

10.—PRIOR ACTION BY DEFENDANT—ABSENCE OF AFFIDAVIT—TAKING BY CONSTABLE.—Plaintiff's proof of a prior judgment for the defendant in a former action of claim and delivery brought by the defendant against plaintiff's assignor, to which a constable seized the property which then belonged to plaintiff, without any evidence that an affidavit in replevin was filed, on which a direction might have been indorsed to the constable to take the property, and without any proof that the constable took it by defendant's direction, it appearing merely that he put a keeper in charge, and never turned the property over to the defendant or to any one, whatever cause of action it may show in favor of plaintiff against the constable, fails to connect the defendant therewith.

11.—APPEAL—"TRANSCRIPT."—Where there is nothing in the justice's docket to show that the former judgment was appealed from, the caption of a "Transcript on Appeal offered in evidence" is not evidence that there was an appeal.

APPEAL from a judgment of the Superior Court of Sonoma County. E. D. Ham, Judge presiding.

The facts are stated in the opinion.

Lippitt & Lippitt, for Appellant.

J. P. Rodgers, for Respondent.

CHIPMAN, C.—The action was trover, to recover the value of certain thirty tons of hay, and also damages for pursuit of the property. At the close of plaintiff's evidence defendant moved for a nonsuit; his motion was granted, and judgment was entered for defendant. Plaintiff appeals from the judgment and from the order denying his motion for a new trial. The grounds of the motion for nonsuit were: 1. That there is no evidence connecting defendant in any way with the hay; and 2. That plaintiff offered in evidence certain proceedings in the justice's court of Petaluma Township, Sonoma County, showing that defendant had obtained a judgment against the plaintiff for the whole of the hay involved, and plaintiff therefore has no interest in the hay.

John Zenoni, plaintiff's assignor, testified that he was in possession of a ranch which he had leased for one year from defendant and her son, William Barry, dated September 29, 1896; that the rental was payable in cash, and was fully paid for the year; that he raised a crop of hay on the land, part of which he sold, and that on August 26, 1897, he had twenty-five bales remaining, on which day one Brush, constable of Petaluma Township, served certain papers on him and took all the hay and put it in the keeping of one Tom Barry (who was defendant's son), and that he, Zenoni, never got the hay back (nor did his assignee, as elsewhere appeared), but the hay was left on the ranch, and was there after the lease expired.

Plaintiff next introduced in evidence certain papers in an action brought in the justice's court of Petaluma Township, wherein Julia Barry (defendant herein) was plaintiff and John Zenoni (assignor of plaintiff herein) was defendant. These papers were introduced presumably to show that Mrs. Barry took the hay from Zenoni and by what means. The action was claim and delivery to recover possession of the same hay as is here in question. Plaintiff introduced the complaint, answer, and undertaking. No affidavit, as required by the statute, appeared among the papers, and none was introduced, nor was its absence explained. Plaintiff also intro-

duced the summons in the action which was returned duly served on August 26, 1897. Plaintiff next introduced what is entitled, "Transcript on Appeal offered in evidence," which apparently is followed by the entries in the justice's docket in *Julia Barry v. John Zenoni*. It shows: Complaint filed August 26, 1897; undertaking on claim and delivery of personal property filed August 26, 1897; summons and demand issued and handed to G. M. Brush, constable, August 26, 1897; summons returned and filed August 27, 1897, "with the following indorsement," which shows personal service on defendant Zenoni by delivering a copy of the complaint attached to the summons; answer filed August 31, 1897, and trial set for September 8, 1897, by agreement, on which day the cause was tried, and "after argument by respective parties the action was then submitted to the court, and after due consideration the court found judgment for plaintiff," and judgment was entered. "Done in open court this 18th day of September, 1897. N. KING, Justice of the Peace." There is nothing in the justice's docket to show that the cause was in fact appealed. The caption "Transcript on Appeal offered in evidence" is not evidence that there was an appeal.

George Brush, constable of Petaluma Township, testified that he went to the Barry ranch, and, being asked who sent him there, testified: "I got the papers at the justice's court. I do not know that anybody sent me out there particularly." Being asked what papers he got at the justice's court, replied: "Well, I got the summons and the writ of attachment." He was asked whether he meant "writ of attachment or claim and delivery," and replied: "When I first went out there it was a writ of attachment." He made no further explanation and his testimony remained in this condition. Being asked what he did after he got to the ranch, he replied: "I went out there and attached the hay and I believe I attached some 200 odd bales. I put a keeper in, and I took the hay in my possession and put the keeper in. . . . I did not turn it over to anybody; I had no authority to do that. . . . I do not know what became of it." He testified that he saw it afterwards in November on the ranch when one of the Barrys was in possession of the ranch. He testified that he did not turn it over to defendant, Mrs. Barry.

Mrs. Barry testified that the hay was put in her barn; that

"the mice and rats eat it up; it got wasted away since that time."

"Q. Did you use any portion of it?"

"A. No, sir; not a stalk. I have no stock and never used a stalk of it." She testified that she and her two sons owned the place. "When the hay was first put in the barn it was not baled. It was loose and then he took it out and baled it. It was put back in the barn after it was baled because he was about to take it away. My sons put it back, Thomas and William." Asked who was on the ranch then, she replied: "I was not there at all." This is all the evidence in the case.

There is evidence that the hay belonged to plaintiff when taken by the constable, and if the suit had been commenced against the officer a different case would be presented. Construing the evidence strongly against defendant on her motion for nonsuit, we yet cannot see that it connects her with the taking of the hay. The constable insisted that he took the hay under writ of attachment, and if he was mistaken in this the plaintiff failed to show it. No affidavit on claim and delivery was shown on which the plaintiff or her attorney might have indorsed a direction to the constable to take the property. (Code Civ. Proc., sec. 511.) So far as we know from the transcript, there was no affidavit filed in the replevin case. The docket of the justice showed no affidavit. No inference can be drawn from Mrs. Barry's testimony that the constable took the hay by her direction, or that she personally had anything to do with it before, at the time of, or after the taking by the constable.

As the evidence stood when the case was submitted by plaintiff, there was no cause of action proven against defendant.

We advise that the judgment be affirmed.

Harrison, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Henshaw, J., McFarland, J., Lorigan, J.

[S. F. No. 3950. In Bank.—December 10, 1904.]

GEORGE B. MERRILL, Appellant, v. ANDREW J. GUNNISON et al., Respondents.

ACTION FOR SERVICES—COMPROMISE OF LITIGATION—CONFLICTING EVIDENCE—REASONABLE CAUSE FOR BELIEF—SUPPORT OF FINDING.—In an action for services alleged to have been rendered for defendants in effecting a settlement and compromise of litigation, where the court found that such defendants did not engage the services of plaintiff, nor employ him in the settlement and compromise, nor request him to perform the services, and the evidence is conflicting as to whether the defendants had reasonable cause to believe that plaintiff was working for their benefit and expected pay from them, or as to whether they had reasonable cause to believe, and did believe, that plaintiff acted solely as agent for the opposite party to the compromise, the finding is supported, and cannot be disturbed upon appeal.

IN—PROVINCE OF TRIAL COURT—CONFLICTING INFERENCES.—It is the province of the trial court not only to weigh testimony which is in direct conflict, but also to determine between conflicting inferences and deductions which may reasonably be drawn from the direct testimony given and the circumstances proven.

ID.—FINDING—ABSENCE OF REQUEST—IMPLIED REQUEST NEGATED.—The finding that the services were not rendered at the request of the defendants includes the negation of an implied as well as of an express request.

ID.—CONSTRUCTION OF FINDINGS—IMMATERIAL OMISSIONS.—The findings must be so construed as to sustain the judgment where such construction is reasonable; and where it clearly appears therefrom that the defendants are not liable for the plaintiff's services it was unnecessary for the court to find whether or not they were rendered to or for some other person, or whether or not the plaintiff voluntarily rendered the services for the defendants without expectation of remuneration from them.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

George B. Merrill, and John H. Miller, for Appellant.

It is sufficient that the services were rendered with the knowledge and assent of the defendants for their benefit.

(Civ. Code, sec. 3519; 15 Am. & Eng. Ency. of Law, pp. 1082-1083; 1 Beach on Contracts, secs. 462, 650; 2 Parsons on Contracts, p. 47; Hammon on Contracts, sec. 50; Mechem on Agency, sec. 601; Wood on Master and Servant, sec. 71; *Shelton v. Johnson*, 40 Iowa, 84; *Scully v. Scully*, 58 Iowa, 548; *De Wolf v. City of Chicago*, 26 Ill. 444; *Wheeler v. Hill*, 41 Wis. 447; *Strasser v. Conklin*, 54 Wis. 102, 106; *Christy v. Sawyer*, 44 N. H. 298; *Hach v. Purcell*, 21 N. H. 549; *Weston v. Davis*, 24 Me. 375; *McClary v. Michigan Central R. R.*, 102 Mich. 312; *Seals v. Edmondson*, 73 Ala. 298;¹ *Jones v. McGilvery*, 43 Me. 488; *McFarland v. Holcomb*, 123 Cal. 84-86; *Sacramento County v. Southern Pacific Co.*, 127 Cal. 223; *Brown v. Atchison*, 39 Kan. 37.²) The failure to make a finding in the issue as to the person for whom the services were rendered is a decision against law. (*Swift v. Occidental etc. Co.*, 141 Cal. 161; *Knight v. Roche*, 56 Cal. 17; *Spotts v. Hanley*, 85 Cal. 168; *Haight v. Tryon*, 112 Cal. 6; *Polk v. Boggs*, 122 Cal. 114.)

Orrin K. McMurray, and Campbell, Metson & Campbell, for Respondents.

The evidence is sufficient to justify a finding that plaintiff expected payment from the other party to the compromise, and that defendants had reason so to believe, and in this view defendants are not liable. (Harriman on Contracts, 2d ed., secs. 44, 45, 48; *Price v. Hay*, 132 Ill. 543; *Coleman v. United States*, 152 U. S. 96; *Boulton v. Jones*, 2 H. & N. 564.) All ambiguities and inferences in the findings must be resolved in support of the findings and judgment. (*People's Home Sav. Bank v. Rickard*, 139 Cal. 291, and cases cited.) The sufficiency of the findings to support the judgment cannot be considered on motion for new trial. (*Swift v. Occidental etc. Co.*, 141 Cal. 161; *Rose v. Mesmer*, 142 Cal. 322; *Sharp v. Bowie*, 142 Cal. 462.) It was unnecessary to find who was liable to pay plaintiff, since the findings show that defendants are not liable.

SHAW, J.—The plaintiff appeals from an order denying his motion for a new trial. The action is to recover the value of services alleged to have been rendered by plaintiff for the

¹ 49 Am. Rep. 51.

² 7 Am. St. Rep. 515.

defendants in effecting a settlement and compromise of certain actions then pending in which one T. I. Bergin was plaintiff and Florence B. Moore was defendant, and in which the defendants here were attorneys for the defendant Moore.

The court found that the defendants did not engage the services of plaintiff, nor employ him in said settlement and compromise, nor request him to perform the services. The appellant admits that there was evidence to sustain a finding that there was no express request by defendants to the plaintiff to perform the services, but he insists that the uncontradicted evidence establishes facts from which the law will imply both a request and a promise to pay. The facts from which it is claimed that this request must be implied are, that plaintiff performed the services in question with the knowledge and assent of the defendants; that the services were beneficial to the defendants; that defendants have received the benefits; that the circumstances were such that the defendants had good reason to believe that plaintiff expected defendants to pay him for the services, and that they, without objection, permitted him to render the services, and did nothing to disabuse his mind of the expectation that they would pay him, or to let him know that they supposed he was acting for Mr. Bergin in the matter of the compromise. That there was some evidence tending to establish these facts cannot be denied. But, on the other hand, there was evidence which, either by direct statement or fair inference, tended to show that the defendants had reasonable cause to believe, and did believe, that the plaintiff was engaged by Mr. Bergin to perform the services in connection with the compromise; that the defendant Bartnett was the only one of the defendants who had any talk with plaintiff, and that the matter of the suit was first mentioned between plaintiff and Bartnett in two conversations which came up casually, or at least without design on the part of Mr. Bartnett; that the suggestion of a compromise came from the plaintiff; that there was nothing in the subsequent negotiations to indicate to the defendants that plaintiff was not acting in the matter at the instance and on behalf of Bergin; that they all the time supposed they were dealing with him as the representative of Bergin, and that their intention in stating to him from time to time what Mrs. Moore would pay in settlement was to inform him as Bergin's

agent, and not to authorize him as their agent to communicate the offers to Bergin. Under these circumstances, we cannot say that defendants had reason to believe that plaintiff expected them to pay him for his efforts in aid of the compromise, or that it was not reasonable for them to suppose that he was acting for Bergin, or that it was incumbent on them to inform him that they did not consider themselves to be his employers. The case is not the same as where one knowingly permits another to work for him under such circumstances that it would be unreasonable to suppose he was employed by a third person. Here there was good reason to suppose plaintiff was acting for the opposite party to the negotiation, and the plaintiff's own conduct was at least equivocal on that subject. We do not mean to say that there was not evidence contrary to these facts. But it is the province of the trial court not only to weigh the testimony which is in direct conflict, but also to determine between conflicting inferences and deductions which may reasonably be drawn from the direct testimony given and the circumstances proven. In view of this well-known rule we cannot hold that the findings are not supported by the evidence.

It is also claimed that the decision is against law for the reason that the court does not find the person or persons to whom the services were rendered. The finding that the services were not rendered at the request of defendants includes a negation of the fact of an implied request as well as of an express request, and means that there was no request, either express or implied. The findings must be so construed that they will support the judgment, where such construction is reasonable. As it thus clearly appears that the services were not rendered under circumstances which would make the defendant legally liable to the plaintiff for their value, it was not necessary for the court to find whether or not they were rendered to or for some other person, or whether or not the plaintiff voluntarily rendered the services to the defendants without expectation of remuneration from them.

The order is affirmed.

Angellotti, J., Henshaw, J., Lorigan, J., and Van Dyke, J., concurred.

Rehearing denied.

[S. F. No. 3110. Department Two.—December 12, 1904.]

V. A. HAGER, Respondent, v. A. ASTORG, M. ASTORG et al., Defendants; A. ASTORG, Appellant.

EJECTMENT—TITLE UNDER FORECLOSURE—PARTIES—HOLDER OF UNRECORDED DEED—CONCLUSIVENESS OF DECREE—EVIDENCE—KNOWLEDGE OF DEED.—In an action of ejectment to recover land sold to the plaintiff as mortgagee under a decree for the foreclosure of the mortgage, a defendant who was the holder of an unrecorded deed from the mortgagor when the foreclosure suit was commenced need not have been made party thereto, and is concluded by the decree; and evidence is inadmissible on his behalf to show that the plaintiff had actual knowledge of the unrecorded deed before such suit was commenced.

ID.—INSUFFICIENT DEFENSE—EXECUTED TRUST.—The court also properly excluded evidence of an insufficient defense by the holder of the unrecorded deed, to the effect that the plaintiff knew when the mortgage was executed that the mortgagee held the legal title in trust for him, it further appearing from the answer that the trust had been executed and terminated by the unrecorded deed about two years before the foreclosure of the mortgage.

ID.—OTHER DEFENSES—ADJUDICATION BY DECREE—INADMISSIBLE EVIDENCE.—Defenses that the foreclosure suit was prematurely brought before the debt was due, and that the amount of interest claimed was not due, and that the mortgagee had agreed to release the holder of the unrecorded deed, and to look to the mortgagor alone, were necessarily adjudicated by the decree of foreclosure, and evidence was properly excluded in proof thereof.

ID.—ORDER OF SALE—ABSENCE OF SEAL—CERTIFIED COPY OF DECREE—AUTHORITY TO SHERIFF—COLLATERAL ATTACK.—An order of sale issued under the signature of the clerk, without a seal attached thereto, but which embodies a certified copy of the decree of foreclosure, certified under the seal of the court, is not void, and is at most erroneous and amendable, and cannot be attacked collaterally. Such order was sufficient authority to the sheriff to sell and convey the mortgaged premises as against persons concluded by the decree, and cannot be assailed in an action of ejectment by one so concluded.

APPEAL from a judgment of the Superior Court of Lake County and from an order denying a new trial. **R. W. Crump, Judge.**

The facts are stated in the opinion of the court.

T. J. Sheridan, and George D. Shadburne, for Appellant.

H. V. Keeling, and Henry H. Reid, for Respondent.

LORIGAN, J.—This is an action in ejectment to recover a tract of land in Lake County, to which plaintiff obtained a sheriff's deed, under a sale upon foreclosure of a mortgage, executed to her by the defendant M. Astorg.

Judgment was entered in favor of plaintiff against all the defendants, but the defendant A. Astorg alone appeals, and does so both from the judgment and an order denying his motion for a new trial.

The main point on this appeal arises under the following facts: On April 27, 1898, the defendant M. Astorg executed the mortgage above referred to, to the plaintiff, who immediately had it recorded; subsequent to such recordation, and on June 2, 1898, said M. Astorg deeded the mortgaged premises to the appellant A. Astorg; on January 12, 1900, the plaintiff commenced an action to foreclose the mortgage, making of these parties M. Astorg alone a defendant; when the foreclosure proceedings were commenced, the conveyance from M. Astorg to A. Astorg had not been recorded, and was not recorded until after the decree of foreclosure had been entered. Appellant set up these facts in his answer, and further averred that plaintiff, at the time she commenced her action of foreclosure, knew that the conveyance of the premises had been made by M. Astorg to him, and that he was then sole owner, but that she failed to make him a party defendant in the foreclosure proceedings.

Upon the trial appellant sought to make proof of this knowledge of plaintiff of the existence of the conveyance to him when she filed her complaint to foreclose, but on objection of the respondent the court decided that this evidence was inadmissible, and whether the ruling of the court was correct or not is the important question to be now determined.

The lower court was undoubtedly of the opinion that, as the conveyance to the appellant was not recorded when the foreclosure proceedings were commenced, it was immaterial whether plaintiff had actual knowledge of its existence or not; that she was required to make those persons defendants only whose conveyances appeared of record at the time she insti-

tuted her foreclosure suit. We are satisfied that this view was correct under the code and the authorities.

It is provided by section 726 of the Code of Civil Procedure that "No person holding a conveyance from or under the mortgagor of the property mortgaged, . . . which conveyance . . . does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance . . . as if he had been a party to the action."

The language of this section is not open to construction. It plainly declares that it is unnecessary to make any person a party to an action of foreclosure whose conveyance from the mortgagor, subsequent to the mortgage, is unrecorded at the time the action is commenced, while, at the same time, it binds such person by the decree in the action as conclusively as though he had in fact been made a party to the suit. The element of actual knowledge of the existence of such conveyance, in the absence of its recordation, is not within the terms of the section. The presence, or absence, of the subsequent conveyance upon the record in the proper office when the action is commenced is the exclusive test as to whether the holder thereof need or need not be made a party defendant, so as to bind him by the foreclosure decree. This is the only test in foreclosure proceedings which the law furnishes, and, under the section above quoted, it is not necessary to make such holder of an unrecorded conveyance a party defendant, even though the mortgagor may have actual knowledge of the existence of such conveyance when the foreclosure suit is commenced. He need only look to the appropriate records, and make parties to the action those alone whose subsequent conveyances appear thereon.

This section, above quoted, was under consideration in the case of *Aldrich v. Stephens*, 49 Cal. 678, and this was the view there taken of the meaning of its provisions, and that decision has since remained undisturbed. (See, also, *Hawes on Parties to Actions*, sec. 7.)

It necessarily follows from these considerations that the court properly excluded all evidence attempted to be offered as to knowledge upon the part of plaintiff, when she brought

her action to foreclose, of the existence of the unrecorded subsequent conveyance to appellant.

Appellant further averred in his answer, that at the time the mortgage was made by M. Astorg the plaintiff knew, and that it was the fact, that the said M. Astorg held the legal title to the premises in trust for appellant, and he sought on the trial to prove these facts, under a contention that as beneficiary under the trust, and as the real party in interest, it was necessary for the plaintiff to make him a party defendant in the foreclosure suit, in order to bind him by the decree, and complains, on this appeal, because he was not permitted to introduce evidence to show these facts. Without discussing the legal aspect of this proposition, it is sufficient to say that other averments in appellant's answer show that the trust he claimed existed had been terminated almost two years before the foreclosure suit was begun, by a conveyance from the trustee, M. Astorg, to himself of such legal title, so that, when the suit to foreclose was commenced, appellant was not a beneficiary under any trust, but was the holder of a legal title by an unrecorded conveyance thereof, and for that reason, as far as the necessity for making him a party, came within the provisions of section 726 above cited.

Additional points are made by appellant in his brief, concerning the action of the lower court in precluding him from proving other alleged defenses, by sustaining objections of respondent to inquiries directed to that end. These defenses were that the foreclosure suit had been prematurely brought, because the note sued on was not then due; also involving some question as to the amount of interest due at that time, and a claim that plaintiff had agreed to release M. Astorg from all liability on the note and under the mortgage, and to hold the appellant solely responsible therefor. But these were all matters which were involved in the foreclosure suit,—who was liable upon the note, and in what amount, and whether the note was due so as to authorize the foreclosure of the mortgage given to secure its payment,—and these matters were necessarily adjudicated by the decree of foreclosure, and hence were not thereafter open to question by the appellant, who, by the section of the Code of Civil Procedure above cited, was conclusively bound by that decree.

There is but one further point in the case requiring con-

sideration. In proving her title to the premises in dispute, the plaintiff introduced in evidence the judgment-roll in the foreclosure proceedings, together with the order of sale, return thereon, and the sheriff's deed of the land. The order of sale, while properly signed by the clerk, did not have attached to it the seal of the court, and appellant objected to its introduction in evidence on that account. The court admitted it, and this is assigned as error. It appears that this order of sale, properly signed by the clerk, but without the seal of the court attached, was delivered to the sheriff, and under it the sale was made. The order itself contained a complete copy of the decree of foreclosure, duly certified to by the clerk, with his signature and the seal of the court attached.

The direction in the order of sale itself, in the case at bar, which is not attacked save for want of a seal, consists of a direction to the sheriff to sell the property as provided by law, apply the proceeds of the sale to the satisfaction of the judgment, and to do all things according to the terms and requirements of the judgment and the provisions of the statute. But all these directions are equally provided for in the certified copy of the decree itself which is incorporated in the order of sale, so that the recitals in the order aside from the decree amount to nothing more than a reiteration of the provisions of that decree.

The contention of the appellant, as we gather it (because he makes this point by way of *addenda* to his brief with a reference to some authorities, but without discussing the matter), is, that the validity of this order of sale is to be governed by the requirements of section 682 of the Code of Civil Procedure relative to writs of execution. That section provides that such writs shall, among other things, be sealed with the seal of the court. Appellant contends that the failure to place the seal of the court on the order of sale rendered it void, and as bearing upon this point he cites from the decisions of this court the case of *O'Donnell v. Merquira*, 131 Cal. 527.¹ But that case did not involve the question of the absence of a seal, but the failure of the clerk to authenticate the writ with his official signature, which failure, it was held, rendered the execution void.

Whether the absence of a seal would have the like effect

¹ 82 Am. St. Rep. 389.

upon the validity of a writ of execution, as the failure of the clerk to attach his official signature thereto, we are not called on to determine, because we are satisfied that, as far as its absence from an order of sale is concerned, it would only render the process erroneous. Aside from this, it may well be questioned whether the power of the sheriff to sell under a foreclosure decree is to be tested by the same rule which governs his power under a writ of execution issued upon a money judgment, as was the case in *O'Donnell v. Merquiere*, as appears from a recital of the facts in *Merquiere v. O'Donnell*, 139 Cal. 7.¹ Upon a money judgment it is, of course, clear that there can be nothing in the terms of the judgment authorizing a sale of property to satisfy it, and the only authority which the sheriff can obtain to do so must be by virtue of a valid writ of execution issued by the clerk and placed in his hands for that purpose. His authority to sell can be derived solely under the writ. His authority to sell under a foreclosure proceeding is, however, derived from the decree, and the specific directions to sell which it contains.

As was said in *Spaulding v. Howard*, 121 Cal. 197, in discussing this subject: "The sheriff, under the Code of Civil Procedure, proceeds with the sale by virtue of the decree and such direction as the court may give. (Code Civ. Proc., sec. 726.) The proceedings follow by analogy sales upon execution, but not necessarily so. The power to sell comes from the statute and the decree."

But, be this as it may, we are satisfied that, as to an order of sale issued under a decree of foreclosure, the omission of the seal of the court therefrom renders the process erroneous merely, and this view is supported by the case of *Newmark v. Chapman*, 53 Cal. 559. In that case, the only process under which the sheriff made the sale was a certified copy of the decree of foreclosure, and, hence, there was involved in that case a more serious question as to the validity of the sale than is presented here. In the case cited there was no order of sale at all; in the case at bar there was a defective one. In *Newmark v. Chapman*, the court, while holding that the process under which the sale was made, though erroneous, was not void, said: "The process under which the mortgaged property was sold was only a copy of the judgment issued and attested

¹ 96 Am. St. Rep. 91.

by the clerk. It did not conform to sections 682 and 684 of the Code of Civil Procedure, as it did not purport to have been issued in the name of the people, nor was it directed to the sheriff, nor did it direct him to execute the judgment. . . . The process was erroneous; but was it, for the defects above mentioned, void? The judgment itself directed the sheriff to do all that process, issued in the most formal and regular manner, could have directed him to do. If the process was amendable by supplying the above-mentioned defects, it was not void; for void process cannot be amended, and if it was amendable, it will be treated, in this proceeding, as having been amended—that is to say, it cannot be attacked collaterally.”

If, then, in the case cited, the process under which the sale was made, consisting solely of a certified copy of the decree, was erroneously merely, as the court there held, in the case at bar there is less ground upon which to base a claim that the process here involved was void, because not only was this sale made under a certified copy of the decree of foreclosure, but also under an order of sale, which, at most, was defective in matter of form.

We are satisfied from an application of the above authority, alone, that the process under which the sale in question here was made was not void, but merely erroneous, and that, as to the appellant, who was bound by the decree in the foreclosure suit, as declared by section 726 of the Code of Civil Procedure, and who is now in this proceeding collaterally attacking the sale made under it, the process under which sale was had was sufficient authority to the sheriff to sell and convey the premises mortgaged.

The judgment and order appealed from are affirmed.

McFarland, J., and Henshaw, J., concurred.

[S. F. No. 8045. Department Two.—December 13, 1904.]

THOMAS AMBROSE, Appellant, v. F. A. HYDE, Respondent.

ACTION FOR RENT—VERBAL AGREEMENT FOR LEASE—CONFLICTING EVIDENCE—SUPPORT OF FINDING.—In an action for rent, where the plaintiff testified to a verbal agreement with the defendant to rent grazing-lands for a year, and the defendant testified that he positively declined to rent them for a year, but made overtures to plaintiff for a lease of three or five years, and that, being unable to secure it, he left the premises, a general finding that defendant was not indebted to plaintiff in any sum is sustained by the evidence, and is conclusive upon appeal.

ID.—TENANCY OF AGRICULTURAL LANDS—CONTINUED OCCUPATION—PRESUMPTION—REBUTTAL.—Subdivision 2 of section 1161 of the Code of Civil Procedure creates a presumption of law merely from the continued occupation by a tenant of agricultural lands for more than sixty days after the term, as to the continuance of the lease upon the same terms as the lease of the previous year; and it is permissible for either of the parties to rebut the legal implication arising thereunder from such continued occupation.

ID.—CONTINUED OCCUPATION BY SUBTENANT—FAILURE OF PROOF OF ORIGINAL TERMS OF LEASE.—Assuming, without deciding, that such presumption of law applies to a subtenant who remains sixty days after the term, yet where there is no evidence to show what were the terms of the previous lease as to the amount of rental to be paid thereunder, the absence of such evidence is fatal to the claim of a continuance of the lease by operation or presumption of law.

ID.—VALUE OF USE AND OCCUPATION—ABSENCE OF PROOF.—The plaintiff cannot recover the value of the use and occupation of the premises for the time during which they were occupied by the subtenant after the term where he failed to make any proof of such value.

ID.—EVIDENCE—INADMISSIBLE CONVERSATIONS.—Conversations had between the plaintiff and the wife of his assignor concerning the rental of the premises to the defendant, and had by her with others who tried to rent them, none of which were in the presence of the defendant, were inadmissible, and when given were properly stricken out.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Thomas F. Graham, Judge.

The facts are stated in the opinion of the court.

A. Morgenthau, for Appellant.

Leon Samuels, for Respondent.

LORIGAN, J.—Plaintiff sought in this action to recover the sum of five hundred dollars, in which amount he alleged the defendant was indebted to him on October 1, 1899, for rent of certain grazing-lands in Contra Costa County for the year commencing October 1, 1898. The answer of the defendant was a denial of all the allegations of the complaint. Judgment went for defendant, and from it and an order denying his motion for a new trial plaintiff appeals.

The court made a general finding in favor of defendant, which was, in effect, that he was not indebted to the plaintiff on October 1, 1899, or at any other time, in any sum whatever, and this finding is attacked as not sustained by the evidence. As far as this point relates to the testimony in the case, bearing directly upon any negotiations for the rental of this property, entered into between the plaintiff and the defendant, but little discussion is necessary. The only evidence in the case bearing upon it was that of the parties to the action themselves. The plaintiff testified that the defendant, in his office in San Francisco, October 1, 1898, made a verbal agreement with him to rent the land for a year at a rental of five hundred dollars. This defendant denied, claiming that he positively declined to rent for a year (he was then in possession of the property), but made overtures to plaintiff for a lease of three or five years, and being unable to secure it, left the premises.

In this conflicting condition of the evidence the lower court credited the testimony of the defendant, and, as so credited, it justified the finding of the court, and, under the well-recognized rule, the finding is conclusive upon us.

Appellant contends, however, that the evidence shows that the defendant became a tenant of the premises under him for the year alleged, by operation of law, and hence that the finding is not sustained by the evidence, but is contrary to it.

On this point the evidence shows, that the premises alleged to have been leased were, at all the dates involved in this controversy, owned by one Dr. Posey, the plaintiff having a mortgage on them. In 1897 Dr. Posey being away, his wife leased the premises to some third parties for a term to end October 1, 1898, and from these parties the defendant sublet

them for a few months towards the close of the term, and was in possession when negotiations were opened between plaintiff, who had authority from Dr. Posey to rent the place and apply the rents on his mortgage, and the defendant, relative to a further lease. Pending these negotiations the defendant remained in possession of the premises and occupied them for several months after the yearly lease under which he sublet had expired, and it is from this continued occupation that plaintiff insists that by the operation of law (Code Civ. Proc., sec. 1161, subd. 2), the lease was renewed for a year upon the same terms as the lease for the previous year.

This section creates a presumption of law merely, and it is always permissible for either of the parties to a lease to show circumstances tending to rebut the legal implication arising thereunder, from continuous occupation of the premises, after the expiration of the original term. To what extent, however, the negotiations between plaintiff and defendant, in the present case, looking to a lease for several years, instead of for one year, was effective to rebut this presumption, or whether the section has any application to the facts in the case at bar, under respondent's contention that it has not, we are not called on to determine, because, assuming that the section does apply, still there is not a particle of evidence in the case to show what the terms of the previous lease were as to the amount of rental to be paid under it. All that appears is, that Mrs. Posey made a lease for less than a year to certain parties from whom the defendant sublet, but what rent the original lessees agreed to pay, or the defendant under them, is nowhere mentioned in the record, nor from the evidence can any fair or reasonable inference be deduced upon the subject. There is nothing to show that the rental for the previous year was five hundred dollars, or any other sum whatever. In fact, it is apparent from the record that the case was tried upon the theory that there was an express contract with the defendant to rent the premises for a year from October 1, 1898, for five hundred dollars, and this was the point to which the evidence was mainly addressed. The matter of the previous lease arose incidentally in the case; nothing was shown as to the amount of rent agreed to be paid under it; and hence the claim of a tenancy by operation of law for another year, and liability for the same rental sum as was provided to be paid

in the former lease, is presented on this appeal without any evidence appearing in the record as to what the previous rental was, and the absence of this essential evidence is fatal to the claim.

Appellant insists that the evidence in the case shows that he was entitled to a judgment for at least some amount against the defendant. While it is not very clear upon what theory this claim is based, we will assume that it is asserted upon the ground that as the defendant remained in possession for some months after the lease under which he had sublet had expired, he was at least liable for the value of the use and occupation of the premises for the period of time he remained on them subsequent to the expiration of that lease. The conclusive answer to this claim, on the merits, is, that he offered no proof whatever on that subject. He now insists that a statement contained in a letter written by the defendant to him, that he was ready to pay the rental for the time he used the place, supports his contention. But the strongest effect that can be given to this statement is, that it was a direct acknowledgment by the defendant of his liability for rental during that period; a liability which the law fixed upon him independent of his acknowledgment. There was no statement in the letter as to what that rental was, or rather as to what defendant considered was the value of the use and occupation of the premises during the term defendant occupied it. This was the essential matter to be proven, and plaintiff failed to make any proof of it. He not only did not attempt to offer any competent evidence upon the subject, but, when defendant sought to offer it, strenuously and successfully objected to its being accepted.

Appellant presents several rulings of the court sustaining objections to questions asked of witness by him, and striking out testimony on motion of respondent, and assigns them as error. These rulings were so clearly right that it would serve no useful purpose to particularly refer to them. Mentioned generally, they applied to purported conversations and communications between Mrs. Posey and the appellant concerning the rental of the premises to the defendant, and Mrs. Posey's conversations with persons who applied to her to rent them. The testimony showed that the defendant was not present at any of these conversations, and was not advised of any of the

communications, nor did he know anything about them. Under these circumstances the conversations and communications between plaintiff and Mrs. Posey were not admissible against defendant, and as this was the ground upon which the testimony was stricken out, it was properly done. The conversations with third parties relating to rental by them of the ranch were not admissible for any purpose, and the objections to the questions which involved that matter were properly sustained. There are a few minor points in this same line which we do not think of any moment, and which we, therefore, do not discuss.

The judgment and order appealed from are affirmed.

McFarland, J., and Henshaw, J., concurred.

[S. F. No. 3729. Department Two.—December 14, 1904.]

In the Matter of the Estate of JAMES NOLAN, Deceased,
PATRICK NOLAN et al., Appellants, v. MARY
NOLAN, Administratrix et al., Respondents.

ESTATES OF DECEASED PERSONS—FAMILY ALLOWANCE—FINAL ORDER—
DECREE OF PARTIAL DISTRIBUTION—STATUS OF WIDOW—FINAL AC-
COUNTS OF ADMINISTRATRIX.—Where a family allowance was made to one claiming to be the widow of the deceased, who was appointed administratrix of the estate, and the order became final by failure to appeal therefrom or to move to set it aside, it becomes conclusive as to her status as widow for all purposes connected with the order and the payment of the money thereunder, and it cannot be collaterally attacked upon the settlement of the accounts of the administratrix, notwithstanding it was determined upon a decree of partial distribution that she was not, and never had been, the widow of the deceased. In all collateral proceedings the order or decree must each stand upon its own record.

IN.—POWER OF COURT TO SUSPEND ORDER.—The probate court had no power, without motion or showing upon notice, to suspend the order for the family allowance after it had become final by the lapse of the time to appeal therefrom.

APPEAL from an order of the Superior Court of the City and County of San Francisco settling the final account of an administratrix. J. V. Coffey, Judge.

The facts are stated in the opinion.

Frank J. Fallon, and Mullany, Grant & Cushing, for Appellants.

James G. Maguire, and Edgar D. Peixotto, for Respondents.

COOPER, C.—Appeal from order settling account of Mary Nolan as administratrix of the estate of James Nolan, deceased. The item of six hundred and twenty-five dollars, being the amount of family allowance for twenty-five months at twenty-five dollars per month, paid by the administratrix to herself, is the subject of contest.

Mary Nolan filed a petition in the superior court praying for letters of administration upon the estate of James Nolan, deceased, in which she alleged that she was the widow of said deceased. After notice given, an order was made appointing her administratrix of the said estate; she duly qualified, letters of administration were issued to her, and she has ever since been such administratrix.

In January, 1901, she filed her petition praying for a family allowance, in which she alleged that she was the widow of deceased, and the court afterwards, on the twenty-ninth day of January, 1901, made an order allowing her, as the widow of deceased, the sum of twenty-five dollars per month for her support and maintenance. The amount of the item in contest accrued, and was paid under this order. On petition for partial distribution of the said estate, in December, 1902, after hearing all the parties, the court found that the administratrix is not and never was the widow of deceased, but that deceased left surviving him three brothers and the children of a deceased sister as his only heirs, and the estate was ordered distributed to the said heirs.

It seems to be conceded that said decree was correct as to said partial distribution, and that the administratrix was not the widow of deceased. The question is as to the validity of the family allowance under a valid order of court. In our opinion, the court properly allowed the item. The court had the power, and it was its duty, to make an allowance to the widow of deceased, if he left a widow. (Code Civ. Proc., sec. 1466.) The court, upon the proofs before it at the time, did make such order, and found the administratrix to be the

widow. This order was appealable. (Code Civ. Proc., sec. 963, subd. 3.) It was not appealed from, and no motion made to set it aside, and hence it became final. (*In re Stevens*, 83 Cal. 326;¹ *In re Welch*, 106 Cal. 430.) Having become final, it was and is conclusive as to the *status* of the person in whose favor it was made for all purposes connected with the order and the payment of the money thereunder. The attack here is collateral, and all presumptions are in favor of the order. (*Estate of Bell*, 131 Cal. 4; *In re Welch*, 106 Cal. 430.) How can we say on this collateral attack that the order was not correct and that the administratrix is not the widow of deceased? The decree of partial distribution, if allowed to become final, is conclusive upon her that she is not the widow for the purposes of distribution. The decree making the family allowance, on the other hand, has become conclusive upon the heirs that the administratrix is the widow for all purposes connected with the family allowance. The heirs did not see fit to appeal from the decree making a family allowance; the administratrix does not appear to have appealed from the decree of partial distribution.

In all collateral proceedings the orders or decrees must each stand upon its own record. If there were a substantial conflict in the evidence in each case as to whether or not the administratrix is the widow of deceased, this court would sustain each order or decree upon appeal, if the only ground made were the insufficiency of the evidence in each case. This may appear to the layman to be without reason or justification, but it is only an illustration of the imperfection of human institutions. A man may be acquitted of assault and battery upon a criminal trial before a jury, and yet the injured party might obtain a large verdict against him before another jury in a civil action for the same assault and battery. A man might be sued for seduction and a heavy verdict obtained against him, yet his wife might sue him for divorce on the ground of adultery with the party who obtained the verdict, and the verdict or judgment in the divorce proceedings be in his favor.

A decree of distribution to one as the only heir of deceased made in ignorance of the existence of other heirs, which was not appealed from, and became final, was held conclusive as

¹ 17 Am. St. Rep. 232.

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to the heirs not mentioned in the decree. (*Lynch v. Rooney*, 112 Cal. 279; *Quirk v. Rooney*, 130 Cal. 506.)

It is claimed that three hundred dollars of the allowance accrued after the court had made an order November 29, 1901, suspending the family allowance, and that at least that amount should be charged to the administratrix. The order purporting to suspend the family allowance does not appear to have been made upon petition or notice.

We know of no law, and none has been called to our attention, which authorized the probate judge to suspend the order for family allowance which had become final. If the judge possessed such powers over orders and decrees in probate, no order would become final, and no one would know as to when rights might be lost by the suspension of the orders on which such rights rested. Suppose the order for family allowance had been affirmed here on appeal after being fully presented; could the probate judge then have set it aside or suspended it? He could have done so if appellants' contention be correct. But here, in the absence of any motion to set aside the order on the ground of fraud or mistake, under section 473 of the Code of Civil Procedure, and no action having been brought to set it aside, and no showing as to the insolvency of the estate, the probate judge made the order attempting to suspend an order that had become final. It is said in Woerner on the American Law of Administration (vol. 1, p. 193): "A court of probate which is without power to revoke or revise its own decrees and judgments cannot set aside its own allowance and decree a smaller sum unless the original judgment was reversed, or reformed on appeal, or adjudged void."

In speaking of an order for family allowance this court said (*In re Stevens*, 83 Cal. 326¹): "The order is appealable (Code Civ. Proc., sec. 963, subd. 3), and we are of opinion it should be regarded as final. On an appeal from the order of allowance, all these facts could have been brought to the attention of the court, the ruling reviewed, and the error, if any, corrected. The time for appeal was allowed to pass, and under such circumstances the power of the court over its order is at an end. The court below cannot sit as an appellate court to review its own orders."

The subject is fully discussed in *Estate of Leonis*, 138 Cal.

¹ 17 Am. St. Rep. 252.

194, as to an order vacating a prior order of sale, in a probate proceeding, which had become final. The authorities are there collected and it is not necessary to repeat them here. It was there said: "If the court in a case like this could set aside its order there would be no end to the matter. It might continue time and again to make orders and set them aside."

We advise that the order be affirmed.

Harrison, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed.

Henshaw, J., McFarland, J., Lorigan, J.

[Crim. No. 1216. In Bank.—December 19, 1904.]

In Re GEORGE E. LETCHER upon Habeas Corpus.

EXTRADITION—REGULARITY OF PROCEEDINGS—REVIEW UPON HABEAS CORPUS.—In extradition proceedings, where the indictment in the state to which the extradition is sought charges a public offense within its statute, the regularity of the proceedings had before the extradition is not reviewable upon *habeas corpus*.

ID.—FUGITIVE FROM JUSTICE—CONSTRUCTION OF FEDERAL CONSTITUTION—DECISION OF UNITED STATES SUPREME COURT.—The question as to whether or not the petitioner is a fugitive from justice within the meaning of the federal constitution having been settled by the decision of the supreme court of the United States, its decision on that question is absolutely binding upon this court.

WRIT OF HABEAS CORPUS to Garret Fox and George W. Wittman.

The petitioner alleges unlawful restraint under extradition proceedings from the governor of Ohio to the governor of this state, to answer to an indictment found in the state of Ohio November 21, 1904, for the crime of burning a building in that state January 4, 1881, for the purpose of defrauding an insurance company, by aiding and abetting other persons named in the indictment to commit such crime. The petitioner alleges that there is no affidavit accompanying the demand upon the governor of this state, as required by law, and that the indictment is not in legal form, and was found

without any legal evidence before the grand jury, and there was no evidence before the governor of this state to show that petitioner was a fugitive from justice, and that the contrary was established.

The return of Garret Fox showed that he is the authorized agent of the state of Ohio and that the petitioner was arrested by Chief of Police George W. Wittman under a warrant of arrest from the governor of California, and delivered to said agent.

Samuel G. Tompkins, D. W. Burchard, and John B. Kerwin, for Petitioner.

C. G. Nagle, and Nagle & Nagle, for Garret Fox, Respondent.

THE COURT.—The indictment charges a public offense within the statute of the state of Ohio. The regularity of the proceedings had in that state before extradition is not reviewable by us in this proceeding.

Upon the proposition as to whether or not the petitioner is a fugitive from justice within the meaning of the constitution of the United States, that question seems to be absolutely decided against petitioner's contention by the supreme court of the United States in *Roberts v. Reilly*, 116 U. S. 80, and the decision of that court upon this constitutional question is absolutely binding upon this tribunal. Whether or not the facts in the case of petitioner are such as to call for a modification of the views expressed in *Roberts v. Reilly* is a question which can only be decided by the federal courts, whose writs and processes are open to petitioner.

The petitioner is remanded.

[S. F. No. 4020. Department Two.—December 21, 1904.]

JACOB STEEN, Respondent, v. SANTA CLARA VALLEY
MILL AND LUMBER COMPANY, Appellant.

**APPEAL—ORDER AFTER JUDGMENT—REFUSAL TO RELIEVE FROM DEFAULT
—FAILURE TO SERVE NOTICE IN TIME—MERITS OF APPEAL.—An
order refusing to relieve the appellant corporation from default in**

failing to serve its notice of intention to move for a new trial within the statutory time is appealable as an order after judgment, and a motion to dismiss an appeal therefrom must be denied. The merits of the appeal cannot be inquired into and determined upon such motion.

MOTION to dismiss an appeal from an order of the Superior Court of Santa Cruz County denying a motion to be relieved from default in serving notice of intention to move for a new trial. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

Carl E. Lindsay, for Appellant.

Z. N. Goldsby, and C. B. Younger, for Respondent.

THE COURT.—This case is before us now on a motion of respondent to dismiss appellant's appeal from the order of the court below made January 21, 1904, denying appellant's motion to be relieved from default in not serving within the statutory time its notice of intention to move for a new trial. The order appealed from, being an order made after judgment, is appealable; and its merits cannot be inquired into and determined on this present motion. The motion to dismiss said appeal is denied.

[S. F. No. 2888. Department Two.—December 21, 1904.]

CHARLES ALPERS, and **GEORGE B. MOWRY**, as Administrator, etc., Respondents, v. **GEORGE D. BLISS**, Appellant.

APPEAL—VOLUNTARY DISMISSAL OF ACTION—WRITTEN REQUESTS TO CLERK—MOTION TO VACATE—NON-APPEALABLE ORDERS.—The several voluntary dismissals of an action on the part of the plaintiffs therein by separate written requests to the clerk for such dismissals, without any order of court therefor, are not appealable or subject to review upon appeal, and an order denying a motion to vacate or set them aside is not appealable.

Id.—ORDER DENYING MOTION TO VACATE JUDGMENT OF DISMISSAL.—The final judgment of dismissal being appealable, an order denying a motion to vacate and set aside such judgment is not appealable.

ID.—REVIEW UPON APPEAL FROM JUDGMENT—ORDER STRIKING OUT CROSS-COMPLAINT.—Upon appeal from the judgment of dismissal an order striking out a cross-complaint of the defendant is deemed excepted to under section 647 of the Code of Civil Procedure, and may be reviewed under section 956 of the same code, as an order affecting the judgment.

ID.—RIGHT TO FILE CROSS-COMPLAINT—NEW PARTIES—POWER OF COURT.—The right to file a cross-complaint under section 442 of the Code of Civil Procedure is limited to cases in which the defendant seeks affirmative relief against a party to the action. New parties can only be made by an order of the court; but the court has no power under section 389 of that code to bring into the action for determination a controversy between the defendant and strangers to the action which is irrelevant to the action as between the parties before it. The persons brought in must be persons whose presence is essential to the determination of the controversy before the court.

ID.—PARTITION—EX PARTE ORDER OF JUDGE ALLOWING CROSS-COMPLAINT—CONTOVERSY WITH THIRD PARTIES—ORDER VACATING AND STRIKING OUT—DISCRETION.—Where a defendant at the time of filing his answer in an action for partition obtained an *ex parte* order from the judge out of court permitting a supplemental cross-complaint to be filed, in which he set up a title acquired nine years after the commencement of the action, and alleged that plaintiff's pending suit had transferred their title to a third person, and, without order of court, made such third person a party defendant, with whom a controversy was sought, and the relief against the plaintiffs was limited to a money judgment for rents and profits, the court exercised proper discretion under section 937 of the Code of Civil Procedure to vacate such *ex parte* order, and to strike the cross-complaint from the files.

ID.—RIGHT OF DISMISSAL OF ACTION.—The right of the plaintiffs to have the action dismissed and the authority of the clerk to enter the judgment of dismissal depend upon the condition of the pleadings at the time of the request for dismissal, and where a cross-complaint was properly stricken from the files the plaintiffs' right to dismiss the action was absolute.

APPEALS from orders of the Superior Court of the City and County of San Francisco refusing to vacate a dismissal by plaintiffs, and refusing to vacate a judgment of dismissal, and from the clerk's judgment of dismissal. J. M. Seawall, Judge.

The facts are stated in the opinion.

W. C. Graves, and George W. Chamberlain, for Appellant
Black & Leaming, for Respondents.

HARRISON, C.—This action was brought in 1878 by Charles Alpers and Laura A. Mowry, against eighteen defendants, for the partition of a tract of land in San Francisco. The plaintiffs, in addition to setting forth facts authorizing a judgment for the partition of the tract, alleged that they had for a long time occupied and made improvements upon a particular lot within the tract, less in extent than that to which they were entitled, and asked that in the partition that lot be set off to them. George D. Bliss, one of the defendants named in the action, demurred to the complaint, and on February 7, 1879, his demurrer was overruled, and ten days' time given him within which to answer. No further step appears to have been taken in the action by any of the parties thereto until March 1, 1901, when Bliss filed an answer to the complaint in which he denied that the plaintiffs had any interest in the tract of land, and alleged that he was the owner in fee of the specific parcel thereof described in the complaint. On that day the judge of the superior court, upon the *ex parte* application of Bliss, made an order, which was filed with the clerk, granting him leave to file in the action a "supplemental and cross-complaint" against the plaintiffs Alpers and Louisa Rabe Barroilhet, and the National Fertilizing Company—the last two not having been named as defendants in the original complaint—and directing that these two be made defendants in the action.

In the cross-complaint thus filed Bliss alleged that the plaintiffs had no interest in the tract of land described in the complaint, and set forth certain facts tending to show that in February, 1888, he had become the owner in fee of the specific parcel of land claimed by the plaintiffs, and also alleged that subsequent to the commencement of the action the plaintiffs had conveyed all their interest in the property which was the subject-matter of the action, and that the same had become vested in Louisa Rabe Barroilhet, one of the persons made defendant in the cross-complaint. He also alleged that the National Fertilizing Company, the other defendant, brought into the action by the cross-complaint, "claims some interest in the premises which if any is subordinate and subject to" his interests. He also alleged that the plaintiffs Charles Alpers and Laura A. Mowry were for a long time in the wrongful occupation of the premises, and that the rents,

issues, and profits of the premises during such occupation were five thousand dollars, and that he had suffered damage in the sum of five thousand dollars by reason of their withholding the same. He therefore prayed judgment for the possession of the premises, and that he be declared the owner thereof, and recover five thousand dollars for rents, issues, and profits and five thousand dollars for damages.

May 17, 1901, upon motion of the plaintiff Alpers, the court made and entered in its minutes an order vacating and setting aside the previous order granting leave to file a supplemental and cross-complaint, and thereafter the said cross-complaint was by its order stricken from the files of the court. Afterwards, on the same day, the plaintiff Alpers presented to the clerk of the court a written request to dismiss the said action on his part, which was filed among the papers in the case, and he also entered an order to like effect in the order-book of the clerk of said court; and on May 20th George B. Mowry, as administrator of the estate of Laura A. Mowry, who had been substituted as a plaintiff in the action in the place and stead of Laura A. Mowry, the original plaintiff, since deceased, presented a written request to the clerk of the court to dismiss the said action upon his part, which was filed among the papers in the case, and he also entered an order to like effect in the order-book of said clerk. May 22, 1901, the clerk entered a judgment of dismissal of said action on the part of the plaintiffs, in accordance with the said requests. Thereafter Bliss gave notice that he would move the court "to vacate and set aside the purported dismissal of said action by the plaintiff Alpers on the 17th day of May, 1901, and also the purported dismissal of said action of the 20th day of May, 1901, by George B. Mowry, as plaintiff in said action, as the successor of Laura A. Mowry, one of the original plaintiffs," and would also at the same time move the court to vacate and set aside the judgment of dismissal entered in the action May 22, 1901. Upon the hearing of this motion the court made and entered in its minutes an order denying the same. From this order and the aforesaid judgment the present appeal has been taken—the appellant stating in his notice of appeal that he appeals "from the order made and entered in the minutes of said court on the 17th day of June, 1901, denying the motion of the defendant George D. Bliss to vacate and set

aside the purported dismissal of said action by the plaintiff Charles Alpers filed on the 17th day of May, 1901, also from the order denying the motion of defendant George D. Bliss to vacate and set aside the purported dismissal of said action on the 20th day of May, 1901, also from the order denying the motion of the defendant George D. Bliss to vacate and set aside the judgment of dismissal entered on the 22d day of May, 1901, and also from the judgment of dismissal entered on the said 22d day of May, 1901, and from the whole thereof."

1. The "purported dismissals" of the action by the plaintiff Alpers on May 17th and of the plaintiff Mowry on May 20th were merely written requests by them to the clerk for a dismissal of the action, filed among the papers in the case. As they were not orders of the court, there could be no appeal from them, and they are not subject to review by an appellate court; and being thus non-appealable the order of the court refusing to vacate or set them aside is also non-appealable. (*Harper v. Hildreth*, 99 Cal. 265.)

2. Neither is the order denying the motion to vacate and set aside the judgment of dismissal appealable. All of the matters presented by the appellant for consideration by the court upon that motion were a portion of its own records in the action, and existed before the order was entered. "It is settled that when a judgment or order is itself appealable, the appeal must be taken from such judgment or order, and not from a subsequent order refusing to set it aside." (*Goyhinech v. Goyhinech*, 80 Cal. 409; *Harper v. Hildreth*, 99 Cal. 265; *Mantel v. Mantel*, 135 Cal. 315.)

3. There remains to be considered the appeal from the judgment. Section 956 of the Code of Civil Procedure provides that upon such appeal the court may review "any intermediate order or decision excepted to, which involves the merits, or necessarily affects the judgment, except a decision or order from which an appeal might have been taken." An order striking out a pleading necessarily affects the judgment, and under section 647 of the Code of Civil Procedure is deemed excepted to and under the provisions of the above section 956 may be reviewed on an appeal from the judgment.

The right of the plaintiffs to have the action dismissed, and the authority of the clerk to enter the judgment of dismissal,

depend upon the condition of the pleadings at the time the plaintiffs made the request for such dismissal. Section 581, (subd. 1) of the Code of Civil Procedure gives to the plaintiff the absolute right to dismiss his action at any time, "provided a counterclaim has not been made, or affirmative relief sought by the cross-complaint or answer of defendant." (*Thompson v. Sprai*g, 66 Cal. 350.) At the time the plaintiffs made their request to the clerk the cross-complaint had been struck from the files under the order of the court, and at that time the only pleading on file in the action on his part was his answer, in which he made no demand for affirmative relief. The plaintiffs' right to dismiss the action was therefore absolute, if the court was authorized to make the order striking the cross-complaint from the files.

The provision of section 442 of the Code of Civil Procedure, giving to a defendant who may seek affirmative relief "against any party" the right to file a cross-complaint at the same time that he files his answer, is limited to cases in which he seeks affirmative relief against a "party" to the action. This section does not give him a right to file a cross-complaint for affirmative relief against one who is not already a party to the action, or to bring new or additional parties into the action by including them in his cross-complaint as defendants thereto. He cannot bring a new party into the action without an order of the court therefor.

Section 389 of the Code of Civil Procedure provides: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed and summons thereon to be issued and served." This section does not give the court power to bring into the action for determination a controversy between a defendant and strangers to the action which is irrelevant to the action between the parties already before it, except for the purpose of making its determination of the controversy between the parties already before it complete, and without prejudice to the rights of others. A defendant cannot inject into the action a contro-

versy between himself and an outsider, even though it affects the property to which the action relates, unless some party already before the court is interested in, or will be affected by, the determination of such controversy. "The controversy" named in the concluding member of the above-quoted sentence is "any controversy between the parties before it" named in the first clause, and includes a controversy presented by a cross-complaint, as well as that presented by the original complaint. (*Winters v. McMillan*, 87 Cal. 256;¹ *MacKenzie v. Hodgkin*, 126 Cal. 591.² See, also, *East Riverside etc. Dist. v. Holcomb*, 126 Cal. 315; *Boskowitz v. Thompson*, 144 Cal. 724.) In either case the "other parties" who may be brought in must be persons whose presence is essential to the complete determination of a controversy between parties who are already before the court. It is "to that end" that the court is authorized to order a cross-complaint to be filed, and a summons thereon to be issued and served. It was evidently in view of these principles that before filing the cross-complaint herein the appellant obtained an order granting him leave to file it and making the "other parties" therein named defendants in the action. This order, however, was made upon the *ex parte* application of the appellant, and without any notice to the plaintiffs, and was not made by the court, but was made by a judge of the court and filed with the clerk.

Section 937 of the Code of Civil Procedure provides: "An order made out of court without notice to the adverse party may be vacated or modified without notice, by the judge who made it; or may be vacated or modified on notice, in the manner in which other motions are made." It may be assumed that when plaintiffs moved to vacate the order granting leave to file the cross-complaint the judge made a more careful examination of the pleadings than was given when the order was made. Upon such examination, and finding that, under its allegations, the interest of the appellant in the property described in his cross-complaint was not acquired by him until more than nine years after the commencement of the action; that he had neglected for more than thirteen years thereafter to assert any right thereto as against the plaintiffs; that after the commencement of the action the

¹ 22 Am. St. Rep. 243.

² 77 Am. St. Rep. 209.

plaintiffs had transferred all their interest in the property and that the same was then vested in Mrs. Barroilhet; that he did not allege that the plaintiffs, or either of them, were in possession of the property described in his cross-complaint, or made any claim thereto; that the right to the possession of the property claimed by him is a controversy between him and Mrs. Barroilhet, in which no other party to the action is shown to be interested; that the only affirmative relief sought by him against the plaintiffs, or either of them, is a money judgment for the value of the rents and profits of the property during the period it was in their occupancy; that, as the action is for the partition of the property described in the complaint, and is not brought upon any "contract" or "transaction," the affirmative relief thus sought does not affect the property to which the action relates, and that neither of these "other parties" named as defendants in the cross-complaint is a necessary party for the complete determination of this controversy, the court might very reasonably conclude that the order had been inadvertently made, and that the plaintiffs should have had an opportunity to be heard before it was made, and therefore that it should be vacated. If so, its action in vacating the order was authorized by virtue of the above section 937 of the Code of Civil Procedure. (*Fremont v. Merced Mining Co.*, 9 Cal. 19; *Borland v. Thornton*, 12 Cal. 440; *Coburn v. Pacific Lumber etc. Co.*, 46 Cal. 31; *Wiggin v. Superior Court*, 68 Cal. 398.)

The motion was addressed to the judicial discretion of the court, and we cannot say that there was any abuse of this discretion in granting it. It was, however, granted "without prejudice," thus leaving to the appellant the right to renew his application upon notice to the persons entitled thereto, and upon the hearing of such application to establish his right, if it existed, to file a cross-complaint.

The judgment and order should be affirmed.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Lorigan, J., Henshaw, J.

[S. F. No. 2963. Department Two.—December 21, 1904.]

GERTRUDE MERNIN, Respondent, v. B. B. CORY, Appellant.

DENTISTS—MALPRACTICE—PERMANENT INJURY TO JAW—SUPPORT OF VERDICT—CONFLICTING EVIDENCE.—In an action against a dentist for malpractice, where there is no room for doubt that the extraction of a tooth resulted in serious and permanent injury to plaintiff's jaw, and if the jury believed the testimony of the plaintiff they could not well avoid finding the malpractice averred, the verdict is sufficiently supported, notwithstanding there might be different conclusions from the evidence as to whether the injury was caused by the careless and unskillful conduct of the defendant.

Id.—INSTRUCTION—ADVICE NOT TO CONSULT PHYSICIAN—AGGRAVATION OF INJURIES.—Where there was evidence to which it was applicable the court properly instructed the jury to the effect that they might take into consideration on the question of damages the facts, if found to be true from the evidence, that her jaw was carelessly and negligently injured by the defendant, that defendant, after her jaw was injured, advised plaintiff not to consult a surgeon or secure medical treatment, that plaintiff, relying upon such advice, delayed to consult a physician or surgeon, and that, by reason of such delay, her injuries were aggravated and became permanent and incurable, and affected her general health, and rendered her unable to work and support herself as she did before she was injured by the defendant.

Id.—DUTY OF DENTIST AS TO ADVICE.—It was the duty of the dentist, though not a physician or surgeon, to give proper advice, and he should have such knowledge of the very bone out of which he extracts a tooth as to enable him to understand whether it had been so injured as to require treatment beyond his skill.

Id.—CARELESSNESS OF ADVICE—OTHER INSTRUCTIONS GIVEN AS TO CARELESSNESS.—It was not necessary to instruct the jury that the advice was carelessly and negligently given, where other instructions clearly informed the jury that carelessness or unskillfulness must have attended all the acts of the defendant so as to make him liable.

Id.—PLEADING—WILLFUL INTENT TO DECEIVE—PROOF—INSTRUCTION AS TO DAMAGES.—An averment in the complaint that the advice was given with willful intent to deceive is superfluous, except upon the question of punitive damages, and the proof of want of reasonable care or skill was sufficient to maintain the action for actual damages, without any evidence of willfulness, and the instruction as given was not erroneous because of such averment.

Id.—EVIDENCE—CLICKING JAW.—Where the plaintiff testified that a popping or clicking of her jaw commenced immediately after the alleged acts of malpractice, claiming that it was produced thereby, although there was evidence to show that such condition might be produced from other causes, it was proper to exclude the evidence of other witnesses that they had popping or clicking jaws.

APPEAL from a judgment of the Superior Court of Fresno County. George E. Church, Judge.

The facts are stated in the opinion of the court.

M. K. Harris, W. D. Turner, and Goodfellow & Eells, for Appellant.

F. E. Cook, A. P. Black, and Frank H. Short, for Respondent.

McFARLAND, J.—This action was brought to recover damages for injuries alleged to have been sustained by plaintiff by reason of the malpractice of the defendant as a dentist. The jury returned a verdict in favor of plaintiff for two thousand dollars, and judgment was rendered for that amount. Defendant appeals from the judgment and from an order denying his motion for a new trial.

We do not see any sufficient ground for maintaining appellant's contention that the verdict was not supported by the evidence. There is no room for doubt that the extraction of one of the plaintiff's teeth by defendant resulted in serious and permanent injury to plaintiff's jaw; and while the question whether or not this injury was caused by the careless and unskillful conduct of defendant when extracting the tooth is one about which there might well be different conclusions drawn from the evidence, still it cannot be truly said that there was no material evidence supporting the conclusion at which the jury arrived on that subject. If the jury believed the testimony of plaintiff, they could not well avoid finding the malpractice averred.

The main contention of appellant is, that there should be a reversal on account of an instruction (No. 4) given the jury at the request of respondent. The facts out of which this litigation arose commenced with an attempt of appellant on or about October 15, 1899, to extract a tooth from the lower jaw

of respondent. Respondent testified, in substance, that while appellant claimed that he had extracted the whole of the tooth, he had in fact broken and mutilated the same and had left part of the root in the jaw; that she so informed appellant at the time, but that he insisted that he had taken it all out; that the jaw became inflamed and very painful; that she visited appellant a number of times and complained to him that a part of the root was still in the jaw, but that he declared that this was not so, and that the inflammation and pain would soon subside; that afterwards appellant admitted that part of the root did so remain, and on November 10th extracted the same, but in doing so he first carelessly and unskillfully took hold with his instrument of the jaw itself, instead of the root, and, as described by respondent in detail, inflicted grave and permanent injury to plaintiff's jaw; that her jaw continued to get worse, so that at times it became fixed and she could not open her mouth; that she frequently visited appellant and asked him to treat it; that he said there was nothing serious the matter; that she repeatedly asked him if she should not have her jaw examined and treated by a physician or surgeon, and he repeatedly advised her not to do so, and that if she did so she would make herself a laughing-stock; that relying on such advice she postponed consulting a physician or surgeon for a long time, and that when afterwards she did consult a physician and was treated at a hospital it was too late for her to receive much benefit from such treatment. In view of this, and other evidence, the court gave the said instruction No. 4, which is as follows: "If you find from the evidence that defendant advised plaintiff not to consult a surgeon, or secure medical treatment, after her jaw was injured by defendant, if you find the same was carelessly and negligently injured by defendant, and that plaintiff relied thereon and did not consult a physician or surgeon for a number of weeks after such injury, and that by reason of such delay plaintiff's injuries were aggravated and made worse, and that it was more difficult or impossible to treat or cure such injuries of plaintiff, and that thereby such injuries became and are permanent and cannot be cured, and the same has affected the general health of plaintiff, and she has become and is sick and disordered and unable to work or perform labor, or support herself by her own labor and work as

she did prior to such injuries, if you find that she did so work and support herself before she was injured by defendant, then I instruct you that you may take all such matters into consideration in fixing the damage incurred by plaintiff by such acts."

It is first contended that this instruction No. 4 was erroneous because it was not the duty of appellant, being merely a dentist and not a general physician or surgeon, to give the kind of advice asked by respondent. We do not think that this contention is maintainable. While a dentist may be qualified for his profession without being learned in the general science of therapeutics, he certainly should have such knowledge of the very bone out of which he extracts a tooth as to enable him to understand whether it had been so injured as to require treatment beyond his skill. It was also contended that the instruction is erroneous because it does not expressly state that the advice was carelessly or unskillfully given. But, in the first place, the court in other parts of its charge, both at the request of appellant and on its own motion, fully and in various forms instructed the jury that even if respondent's injuries resulted from the acts of appellant, still respondent could not recover unless such acts were carelessly or unskillfully done. For instance, the jury were instructed "Should the evidence fail to show that defendant did not exercise ordinary skill, care, and prudence in the work which he did for plaintiff then you must find a verdict for the defendant"; also, "You should also bear in mind that the contention of plaintiff that there was a lack of skill or care on the part of defendant is a fact which the law requires the plaintiff to prove, by a preponderance of the evidence, the same as any other fact or facts in the case, and the jury would not be justified in finding this as a fact upon mere surmises or assumptions"; also, "If the plaintiff sought the services, care, and skill of the defendant for dental work, and the defendant accepted her employment to do such work, the law only required of him the possession of such skill and learning in his profession and only requires of him in the performance of his work such ordinary care and skill as is ordinarily possessed by a person following such profession, and if you find from the evidence in this case that the defendant at the time he performed services for the plaintiff did possess skill and

learning, and that in his services rendered to the plaintiff, in all the work performed for her by him, he exercised that skill and care and good judgment, then you must find a verdict for the defendant, even if you should also find from the evidence that the plaintiff suffered injuries and pain after such services were performed for her, even if caused by the work of the defendant." These instructions clearly informed the jury that carelessness or unskillfulness must have attended all the alleged acts of appellant, in order to make him liable, and there was no necessity of repeating them at every part of the instructions. Moreover, if the facts stated showed malpractice, the use of adjectives or adverbs to expressly characterize such malpractice as careless and unskillful would add nothing to the statement. It is contended also that the instruction was erroneous because it is averred in the complaint that the conduct of defendant referred to in the instruction was willful and intended to deceive, while the instruction does not include the element of willfulness, etc.; but this averment of willfulness was superfluous unless respondent had claimed punitive damages, and the proof of want of reasonable care or skill was sufficient to maintain the action without any evidence of the willfulness.

After the alleged acts of malpractice respondent had a "popping" or "clicking" of the jaw—a disagreeable sound made by the movement of the jaw. Respondent testified that this clicking commenced immediately after the alleged acts of appellant—claiming that it was produced by said acts. Appellant offered to call several witnesses to testify that each of them had a clicking jaw; the court sustained an objection to the proposed testimony; and it is contended that this ruling was prejudicial error. We do not think that this contention is maintainable. In addition to the general objection to the introduction of special instances of this kind and the remoteness of the proposed testimony, its purpose could only have been to show that a number of persons had this peculiar condition of the jaw which had not been produced by the cause to which respondent attributed her condition. But it was abundantly shown by the evidence that this condition may be produced by various causes, and there was no claim or pretense by respondent that it could be produced only by a dental operation. We think, therefore, that the court prop-

erly refused to have its time taken up by listening to the sound of a lot of clicking jaws; for such a spectacle would have added nothing to the elucidation of any real points at issue in the case.

The two contentions above noticed are the ones mainly relied on. We see nothing in any of the other points made for a reversal which calls for special notice, and it is sufficient to say that, in our opinion, no one of them is tenable.

The judgment and order appealed from are affirmed.

Lorigan, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 3373. Department One.—December 24, 1904.]

FRANCIS H. PAGE (A. W. JOHNSON, Executor, Substituted), Appellant, v. W. W. CHASE COMPANY, Respondent.

FORECLOSURE OF STREET ASSESSMENT—ABSENCE OF NOTICE OF LIS PENDENS—PURCHASER PENDENTE LITE NOT CONCLUDED.—Section 409 of the Code of Civil Procedure, as to the filing of notice of *lis pendens*, applies to an action to foreclose the lien of a street assessment, and in the absence of such filing there is no constructive notice of its pendency, and a purchaser who took title from the defendant pending such action, without actual notice of its pendency, and who was not a party to the judgment foreclosing the lien, is not bound thereby.

Id.—PROCEEDING NOT IN REM.—Upon the foreclosure of a street assessment the land is not a party, and it is not a proceeding *in rem*, except in the sense that the amount of the lien can be collected only out of the amount of the property involved in the action. The judgment for the sale of the property is not binding upon the world, and can only affect the interest of an owner made a party to the action or affected with notice thereof.

Id.—CONCLUSIVENESS OF JUDGMENT—CONSTRUCTION OF CODE—NOTICE OF PENDENCY OF ACTION.—The provision in subdivision 2 of section 1908 of the Code of Civil Procedure, that a judgment is conclusive with respect to the matter directly adjudged between the parties and their successors in interest by title subsequent to the commencement of the action, is by the concluding clause of the section applicable only to those cases where the parties have had "notice actual or constructive of the pendency of the action."

ID.—EFFECT OF DISMISSAL—FINDING AND JUDGMENT AGAINST VENDOR—PURCHASER NOT BOUND.—Where the purchaser was served with summons under a fictitious name, after he had obtained title *pendente lite*, without prior notice actual or constructive of the pendency of the action, by the dismissal of the action as to the defendants sued by fictitious names the purchaser ceased to be a party to the suit, and where a finding and judgment were thereafter had against the former owner, adjudging her to be the sole owner of the land involved, the effect of the proceeding is the same as if the action had been originally brought against her alone, and the purchaser is not bound by such finding and judgment.

ID.—STATUTE OF LIMITATIONS—CONTINUANCE OF LIEN—DISCHARGE AGAINST PURCHASER.—The lien of a street assessment continues for two years only, and where the purchaser took title without notice actual or constructive of the commencement of the action, and after the lapse of two years from the date of the lien, he took the title discharged from the lien.

ID.—PURCHASE OF LAND SUBJECT TO LIEN OF STREET ASSESSMENT—INAPPLICABLE RULE—ABSENCE OF PERSONAL LIABILITY.—The title of the purchaser is not affected by the judgment foreclosing the street assessment against the vendor by reason of a provision in the conveyance that it was "subject to any existing lien for street-work." The rule as to the assumption of a mortgage or lien by a purchaser does not apply where the vendor has no personal liability. There is no personal liability for a street assessment, and there can be no deficiency judgment in an action for its foreclosure. Such provision created no personal liability for the amount of the assessment.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a new trial. Frank J. Murasky, Judge.

The facts are stated in the opinion.

Knight & Heggerty, and William M. Madden, for Appellant.

J. C. Bates, for Respondent.

HARRISON, C.—Action to quiet title.

At the trial of the cause it was shown on behalf of the plaintiff that Rosalie M. Schwarze became vested with the title to the land in question on April 20, 1867, and that on March 19, 1900, she conveyed it to the plaintiff by a conveyance which was recorded in the office of the county recorder

on April 2, 1900. The *habendum* clause of the deed contains the following: "subject to any existing liens for street-work." In its answer to the complaint, the defendant alleged that on October 26, 1900, the superior court of San Francisco, in an action upon a street assessment, wherein it was plaintiff and Rosalie M. Schwarze was defendant, had rendered judgment that certain money was due to it and was a lien upon the said land, and directed a sale thereof for the satisfaction of the lien, and that the said judgment was still in full force. At the trial herein the defendant offered in evidence the judgment-roll in that action, from which it appeared that the action was commenced by it May 25, 1899, for the foreclosure of a street assessment against the land, and that Rosalie M. Schwarze, John Doe, and Robert Roe were named as defendants therein; that on October 2, 1900, Rosalie M. Schwarze filed an answer to the complaint therein, in which she disclaimed any interest in the land and set forth that she had conveyed the same to the plaintiff herein on March 20, 1900, and that her said conveyance was recorded April 2, 1900, in the office of the county recorder; that the action was brought on for trial October 26, 1900, and that the court then ordered the defendants sued by the fictitious names of John Doe and Richard Roe dismissed therefrom, and gave judgment, which was duly entered of record, declaring a certain amount of money to be a lien against the said land, and directing its sale for the satisfaction thereof; that on September 18, 1900, prior to the filing of an answer of said Rosalie, the plaintiff herein was served with a copy of summons and complaint in said suit, as and for John Doe, named as one of the defendants therein; that on November 13, 1900, he filed a demurrer to said complaint, which was sustained by the court on November 16th; that notice thereof was on the same day served on the plaintiff therein; that said plaintiff failed to amend his complaint, and that on November 30, 1900, the court gave its judgment, which was duly entered of record, by which it dismissed the action as to the plaintiff herein. The plaintiff then testified that he had no knowledge of the pendency of that action until the service of the summons and complaint therein upon him as John Doe, on September 18, 1900. The defendant herein did not allege in its answer, nor was it shown at the trial, that a notice of *lis pendens* was filed in the recorder's

office at the time the action against Schwarze was commenced, or at any time thereafter. The street assessment upon which the action was brought is shown by said complaint to have become a lien upon the land May 25, 1897, that being the date upon which it is alleged that the warrant and assessment were recorded by the superintendent of streets. Upon the foregoing facts judgment was rendered in favor of plaintiff, and thereafter, upon motion of the defendant, the court granted a new trial. From this order the plaintiff has appealed.

It does not appear upon what ground the court made the order appealed from. In its notice of intention to move for a new trial the defendant stated as grounds therefor insufficiency of the evidence to justify the decision, and errors of law occurring at the trial; but it is not claimed that there was any conflict in the evidence upon any probative fact in the case, or that the existence of such fact depended upon the weight which the court might give to testimony thereon.

The question to which counsel have directed the attention of the court in their briefs upon this appeal, and which underlies the respective rights of the parties to the action, is the effect of the judgment in the street-assessment suit upon the title acquired by the plaintiff from Mrs. Schwarze. If he took the title from her in subordination to the judgment to be thereafter rendered in that action, the defendant's right to the land is superior to his. On the other hand, if the title then taken by him would not be affected by that judgment, it is superior to that of the defendant.

1. The rule of the common law that a purchaser *pendente lite* of the subject of the controversy took as a volunteer or intruder and in subordination to the judgment thereafter rendered in the action is not in force in this state. In lieu thereof, section 409 of the Code of Civil Procedure authorizes the plaintiff in any action affecting the title to real property to file in the office of the county recorder of the county in which the property is situated a notice of the pendency of the action, and declares that "From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action." "The general rule is, that one not a party to a suit is not affected by the judgment; the exception at common law is, that a *pendente lite*

purchaser, though not a party, was so affected; the qualification of the doctrine made by our statute is, that such purchaser is not affected unless notice of such *lis pendens* be filed with the recorder." (*Richardson v. White*, 18 Cal. 103.)

The proposition of the respondent that this section is not applicable to an action for the foreclosure of the lien of a street assessment must be overruled. No authority is cited in support of the proposition and such action is as fully included within the terms of the section as in an action for the foreclosure of a mortgage or of any other lien. (See *McDonald v. McCoy*, 121 Cal. 55.) The decision in *Reeve v. Kennedy*, 43 Cal. 643, cited by the respondent was made by virtue of an express provision in the statute under which the proceedings involved in that action were had, that the lien of the tax should not be removed until the taxes were paid or the property had absolutely vested in a purchaser under a sale for the taxes, and the court held that "the precise object of these provisions was to subordinate to the lien of the judgment all rights acquired by purchasers intermediate the assessment and the rendition of the judgment." The provision in section 1908 (subd. 2) of the Code of Civil Procedure, that a judgment is conclusive with respect to the matter directly adjudged between the parties and their successors in interest by title subsequent to the commencement of the action, is by the concluding clause of the section applicable only to those cases where the parties have had "notice actual or constructive of the pendency of the action." In *Wood v. Jordan*, 125 Cal. 261, and in *Crane v. Cummings*, 137 Cal. 201, cited by the respondent, the grantors in the deeds there discussed were named as defendants in the street-assessment suits and were served with the summons therein, and the conveyances were not made by them until after judgment had been entered against them. In *Roman Catholic Archbishop v. Shipman*, 69 Cal. 586, the plaintiff alleged that as he was not named as a party to the street-assessment suit he was not bound by the judgment therein; and all that the court decided was, that under the allegations of his complaint he had not shown any equitable ground for restraining the enforcement of the judgment against the parties against whom it had been rendered.

2. An action for the foreclosure of the lien of a street

assessment is not a proceeding *in rem*, as contended by the respondent, except in the sense that the amount of the lien can be collected only out of the amount of the property involved in the action. It is not a proceeding wherein a judgment for the sale of the property will bind the entire world, or affect the interest therein of any owner except those who are made parties defendant in the action. There can be no proceeding *in rem* except it be authorized by statute, and in such a proceeding the *res* which is to be affected thereby is the defendant, and must be brought before the court either by seizure or by publication of notice. Unless notice of the proceedings is in some form given to the owner of the *res* and an opportunity afforded him to defend the same, a judgment for its sale would have the effect to deprive him of his property without due process of law. The lien of a street assessment—like any other tax—is to be enforced only in the mode and to the extent authorized by the legislature. (See *Boskowitz v. Thompson*, 144 Cal. 724.) In this state the legislature has authorized its enforcement by means of a suit in equity against the “owner” of the land; and in section 16 of the Street Improvement Act (Stats. 1885, p. 159) the “owner” is defined to be, for the purposes of that act, the person owning the fee, or in whom appears the legal title to the land by deeds recorded in the county recorder’s office of the county. There is no provision that the land shall be made the defendant in such action, or that service of process shall be made upon it as was provided by the statute involved in *Mayo v. Ah Loy*, 32 Cal. 477,¹ and other cases cited in *Crall v. Poso Irrigation District*, 87 Cal. 148, invoked by the respondent upon this point. Under section 8 of the act (Stats. 1889, p. 166), if the name of the owner is unknown to the superintendent of streets, the owner is to be designated in the assessment as “unknown,” but it would not be contended that the contractor could select any person he might choose as the defendant in his action and bind the land by the judgment therein, as against its actual owner as defined in section 16.

3. The finding and judgment of the court in the street-assessment suit that Mrs. Schwarze was the sole owner of the land involved therein at the time of commencing the action, and at all times mentioned in the complaint therein, is not

¹ 91 Am. Dec. 595.

conclusive upon the plaintiff herein. He was not named as a party to that action, and although he was served with the summons and complaint therein as John Doe, named as a fictitious defendant, he was dismissed from the action before the judgment was rendered. After he had been served with process in the suit, the plaintiff therein was informed by the answer filed by Mrs. Schwarze that he had succeeded to her interest in the land many months prior thereto, and if he had remained a party defendant and judgment had been rendered against him, his interest in the land so derived would have been bound by the judgment; but instead thereof the plaintiff caused him to be dismissed from the action and took judgment against Mrs. Schwarze alone. The effect of this proceeding was the same as if the action had been originally brought against her alone. It is unnecessary to determine whether it was competent for the court, after such dismissal, to take any action upon the demurrer which he had previously filed, or whether its action in sustaining his demurrer or its judgment dismissing the action against him is entitled to any consideration. In either case, whether by reason of his previous dismissal from the case or by reason of the dismissal of the action as against him, he ceased to be a party to the suit—and is not bound by the judgment therein. There was therefore no constructive notice to the plaintiff of the street-assessment suit at the time he purchased the land and took the conveyance from Mrs. Schwarze; and as he testified at the trial that he had no knowledge of the pendency of the suit until he was served with the summons and complaint therein in September,—nearly six months after receiving the conveyance,—he is to be regarded as an innocent purchaser, and it must be held that the title then acquired by him is not affected by the judgment therein against Mrs. Schwarze.

4. The assessment upon which the action was brought became a lien upon the land May 25, 1897, and by section 9 of the Street Improvement Act this lien continued for two years. At the time the plaintiff herein purchased the land from Mrs. Schwarze more than two years had elapsed since the date of the lien, and he therefore took the title discharged therefrom.

The contention of the respondents that because the action upon the assessment was commenced within the two years the lien continued as against the appellant cannot be maintained.

Randolph v. Bayne, 44 Cal. 367, and the cases following it, cited by defendant, do not support this proposition. All that was decided in those cases is, that, as against the defendants in the action, the lien does not expire during the pendency of the action if it is commenced within the life of the lien. As in the case of any other lien, the commencement of an action for its foreclosure suspends the running of the statute of limitations in favor of the defendants in the action; but it continues to run so far as others are concerned.

5. The title of the plaintiff is not affected by the judgment against Mrs. Schwarze by reason of the provision in her conveyance to him—"subject to any existing lien for street-work." The evident purpose of this clause in her conveyance was to relieve her from any liability by reason of the implied covenant against encumbrances. The principle which renders a clause in the conveyance of land whereby the grantee assumed the payment of an existing mortgage or other lien thereon available to the holder of the lien is, that he thereby takes the place of his grantor in reference to the obligation secured by the land, and creates an equity in favor of the mortgagee by which the latter may enforce the obligation against him to the same extent that he can enforce it as against his grantor. (*Hopkins v. Warner*, 109 Cal. 133.) The obligation thus assumed by him is, however, only such obligation as exists against his grantor, and is simply an agreement for his indemnity. (*Biddell v. Brizzolara*, 64 Cal. 354.) It can be enforced only by foreclosure, and is limited to the amount for which a deficiency judgment can be docketed after the sale of the mortgaged premises. (*Roberts v. Fitzallen*, 120 Cal. 482.) If there is no personal liability on the part of his grantor, there can be no deficiency judgment rendered, and consequently the rule has no application. (*Ward v. De Oca*, 120 Cal. 102.) As there is no personal liability for a street assessment there can be no deficiency judgment in an action for its foreclosure. Moreover, the language of the aforesaid clause in the conveyance to the plaintiff is not such as would render him personally liable for the amount of the assessment. (*Jones on Mortgages*, sec. 748.)

We advise that the order granting a new trial be reversed.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the order granting a new trial is reversed.

Van Dyke, J., Shaw, J., Angellotti, J.

Hearing in Bank denied.

[S. F. No. 2918. Department Two.—December 24, 1904.]

MARIN COUNTY WATER COMPANY, Appellant, v.
COUNTY OF MARIN, Respondent.

EMINENT DOMAIN—CONDEMNATION OF ROAD OVER LANDS OWNED BY WATER COMPANY—MORE NECESSARY PUBLIC USE.—A water company engaged in the public use of supplying pure and fresh water to the inhabitants of a county, and which has the title to lands subject to the easement of a public road thereon, may, under subdivision 3 of section 1240 of the Code of Civil Procedure, maintain a proceeding in eminent domain against the county to condemn part of such road for the construction and maintenance of a dam and reservoir thereon, where it appears that such use thereof is a more necessary public use than that of the road to which it had been already appropriated.

APPEAL from a judgment of the Superior Court of Marin County. Thomas J. Lennon, Judge.

The facts are stated in the opinion of the court.

Jesse W. Lilienthal, and E. B. Martinelli, for Appellant.

Thomas P. Boyd, and James Alva Watt, for Respondent.

McFARLAND, J.—A demurrer of defendant county of Marin to the complaint for want of jurisdiction, and an insufficiency of stated facts to constitute a cause of action, was sustained without leave to amend, and judgment rendered for said defendants. From this judgment plaintiff appeals. The material averments of the complaint, which presents a proceeding in eminent domain, are that the plaintiff is a corporation engaged in the business of supplying the inhabitants of Marin County with pure and fresh water; that defendant county of Marin is a body corporate and a political

division of the state; that in order that plaintiff may exercise its public use of supplying water as aforesaid it is necessary for it to construct and maintain a dam and reservoir at a certain point, and to take certain described property for the purpose of flooding and permanently covering the same with water by means of said dam and reservoir. It is further averred that the title in fee to said premises is in plaintiff, but that they are "subject to an easement in favor of defendant county of Marin for the uses of a highway, and that the premises sought to be taken herein are a part of the highway or road sometimes called the Fairfax and Bolinas Bay road." It is further averred that the public use for which the property is sought to be taken "is a more necessary public use than that to which it is now appropriated," for certain reasons stated. And it is further averred that defendant county of Marin has refused to vacate the part of the road sought to be taken, or to fix any terms upon which it will consent to permit plaintiff to acquire or have the use thereof. The prayer is, that it may be adjudged that plaintiff have the right to take and hold the said premises for the alleged public use, upon its making compensation to be ascertained, etc.

The question presented is an important one, and we do not know of any former decision of this court in which it has arisen or been determined. After a full consideration of the subject, we have reached the conclusion that the plaintiff has the right to the judgment of condemnation prayed for, if it can prove the averments of the complaint; and that therefore the demurrer was improperly sustained.

It may be conceded that the right of a person, natural or artificial, to exercise the power of eminent domain must be found in some statutory provision. The two provisions of law which are mainly important here are section 1237 and the first three subdivisions of section 1240 of the Code of Civil Procedure. Section 1237 is as follows: "Eminent domain is the right of the people or government to take private property for public use. This right may be exercised in the manner provided in this title." It is contended by respondent that this definition of eminent domain confines it to private property; that this definition attaches to and qualifies all subsequent provisions; and that the property sought to be taken in the case at bar is not private property, and therefore not

within the reach of the power of eminent domain. But section 1240, to and including subdivision 3, is as follows: "The private property which may be taken under this title includes: 1. All real property belonging to any person; 2. Lands belonging to this state, . . . or to any county, incorporated city, or city and county, village or town, not appropriated to some public use; 3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated." These provisions of section 1240 describe and enumerate the kinds of property which, for the purpose of the exercise of eminent domain, shall be deemed to be private property, and "which may be taken under this title"; and in subdivision 3 there is placed in this category, without qualification, "property appropriated to public use." Therefore property appropriated to public use, which includes the property involved in the case at bar, "may be taken" unless the particular property sought to be taken in a given case is excepted and excluded by some other provision. There is such an exception in subdivision 2, which provides that lands belonging to the state or a municipality can be taken only when the land had not already been "appropriated to some public use." In the case at bar the land which had been appropriated to a prior public use did not belong to the county of Marin, or to any other municipality; it belonged to appellant. There is here then presented the case of land belonging to a private person which had been appropriated to a public use, and which under said subdivision 3 may be taken "for a more necessary public use than that to which it has been already appropriated."

Counsel on each side have given instances where unjust or mischievous consequences would follow from the view of the law opposite to that contended by them. The consequences which would follow any particular decision are hardly legitimate arguments to be considered in determining what the law is; but one or two of them may be noticed. Counsel for respondent say that if appellant's view be sustained, then, for instance, a public square or park or schoolhouse might be taken by a private person or corporation under the power of eminent domain. But this apprehension is practically answered by subdivision 2 of section 1240, which provides that

lands belonging to the state or to a municipality which have been already appropriated to a public use cannot be taken under eminent domain for another public use. On the other hand, it is said that if a public road can in no instance be taken for a more necessary public use, then a city desirous of establishing waterworks, or a company furnishing water to a city, could not acquire and maintain dams and reservoirs in another county, no matter how necessary they might be, if a public road, though of little use, happened to run through part of the land necessary to be taken. However, whatever consequences may flow from any particular view, we must declare the law to be as we find it; and considering all the provisions of the code together as they stand, we think that the law on the subject is as above stated. The legislature has always the power to change the law when experience shows that a change is necessary. We do not think that the provisions of the Political Code giving the board of supervisors certain general powers as to laying out and closing public roads have any bearing on the question here involved.

The judgment is reversed, with direction to the court below to overrule the demurrer to the complaint.

Henshaw, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[L. A. No. 1323. In Bank.—December 24, 1904.]

MALVINA BAILLARGE, Appellant, v. E. P. CLARK, Respondent.

**ACTION TO QUIET TITLE—UNDELIVERED DEED—WRONGFUL POSSESSION—
BONA FIDE PURCHASER—IMPROVEMENTS—EQUITABLE ESTOPPEL.**—A wife who executed and acknowledged a deed of her separate property to her husband, and retained the same without delivery, is equitably estopped to deny the delivery and to claim the premises in an action to quiet title against a *bona fide* purchaser deriving title through her husband, who wrongfully obtained possession of the deed and sold the property, where it appears that, instead of promptly repudiating the act of her husband, she, with full knowledge of the facts, allowed such purchaser to make permanent im-

provements upon the property, without notice of her claim thereto prior to the commencement of the action, which was brought nearly three years after acquiring such knowledge.

ID.—PRINCIPLES OF EQUITABLE ESTOPPEL.—Although the title was not operative in the husband for want of delivery of the deed to him by the wife, the equitable estoppel of the wife to deny the delivery as against the *bona fide* grantees of the husband rests upon the maxims that "He who can and does not forbid that which is done in his behalf is deemed to have bidden it," and that "Where one of two innocent persons must suffer, he through whose agency the loss occurred must sustain it," and upon the rule that "It is unconscionable for a party to permit another to improve the property obtained in such a bargain and then claim the property and improvements, even were he to pay the costs of the improvements."

APPEAL from a judgment of the Superior Court of Los Angeles County. D. K. Trask, Judge.

The facts are stated in the opinion of the court.

Adcock & Reymert, for Appellant.

A stolen deed undelivered cannot impart title to the grantee. (*Gould v. Wise*, 97 Cal. 232; *Everts v. Agnes*, 6 Wis. 453; *Meley v. Collins*, 41 Cal. 663.¹) Purchasers from the husband were bound to inquire whether or not there was a breach by the husband of his confidential relation toward his wife. (*McDougall v. McDougall*, 135 Cal. 316; *Stiles v. Cain*, 134 Cal. 170; *Sheehan v. Sullivan*, 126 Cal. 192; *White v. Warren*, 120 Cal. 324; *Tillaux v. Tillaux*, 115 Cal. 670; *Dimond v. Sanderson*, 103 Cal. 97.) The facts do not show an equitable estoppel. (*Davis v. Davis*, 26 Cal. 23.²)

John D. Pope, for Respondent.

A married woman may be estopped by her conduct as to a conveyance of her separate estate. (*Ramboz v. Stowell*, 103 Cal. 588.) The facts created an equitable estoppel to deny delivery of the deed. (*Quick v. Milligan*, 108 Ind. 419,³ and authorities there cited; *Murphy v. Ganey*, 23 Utah 633.)

VAN DYKE, J.—This is an appeal from a judgment entered in favor of the defendant upon the judgment-roll. The action is to quiet title to a strip of land described as lots num-

¹ 10 Am. Rep. 279.

² 58 Am. Rep. 49.

³ 85 Am. Dec. 157.

bers 55 and 56 in block Q of the Santa Monica Commercial Company tract, in the town of Santa Monica.

The court below found that the plaintiff and Maurice Baillarge were husband and wife at the time the said Santa Monica Commercial Company conveyed the premises in dispute to the plaintiff as her separate estate in 1893.

On August 7, 1897, the plaintiff and her husband went before a notary public in Santa Monica to draw their wills, when, upon representations of the notary in reference to the expense of probating a will, they concluded to have mutual deeds executed, one to the other, of the tract of land including the premises in controversy. Thereupon, deeds in the form of grant, bargain, and sale, for a nominal consideration, were prepared and executed, the one to the other. After said deeds were signed and acknowledged, the one in which the plaintiff was grantee was handed to her by the notary, and she thereupon gave the notary the deed and directed him to place the same on record, and the deed executed by plaintiff to her husband, after being acknowledged, was by the notary thereupon immediately handed back to the plaintiff. Two days thereafter, on August 9th, plaintiff departed from Los Angeles County, and went to the dominion of Canada. Prior to her departure she had packed two trunks, in one of which she had placed the deed from herself to her said husband, together with articles of wearing apparel, and gave said trunks to her husband to be checked as baggage, but on account of excess in weight he checked only one of said trunks, leaving the one in which said deed had been placed. And during the time that the plaintiff was on a visit to Canada, Maurice Baillarge, without her knowledge or consent, took the deed of plaintiff to him from the trunk, and, claiming to be the owner of the property therein described, on September 9, 1898, for a valuable consideration, conveyed the property mentioned in the complaint to one W. F. Nordholt; that thereupon said Nordholt filed said deed so executed to himself, and also the deed from the plaintiff to his grantor, Maurice Baillarge, (which had not prior thereto been recorded,) for record in the county of Los Angeles. The said Nordholt did not search the records or cause the records of said county to be searched, and made the purchase solely upon the representation of said Maurice Baillarge that he was the owner of said property. Thereaf-

ter, on October 26, 1898, Nordholt sold and conveyed the premises in question by grant, bargain, and sale deed, to A. I. Smith, for the consideration of six hundred dollars, fifty dollars paid in cash, and a promissory note given for five hundred and fifty dollars, payable in six months after date. Said deed was recorded November 2, 1898, in the records of Los Angeles County. On December 2, 1898, said Smith conveyed said premises to E. P. Clark, the defendant, by grant, bargain, and sale deed, the grantee therein paying Smith fifty dollars cash and agreeing to pay the note of Smith to Nordholt, which he subsequently did; that said deed was thereupon recorded December 5, 1898, in the records of Los Angeles County. The purchase of the premises in question was made by Smith and Clark, and the conveyance was taken by them for the benefit of the Los Angeles Pacific Railroad Company, of which company the defendant, Clark, is the principal manager and director, and said company immediately upon the execution of the deed to Smith entered into possession of the said premises, laid its track across the same, and afterwards, and for six months, continued to make improvements upon said premises in such manner as to use them for a place for repairing and cleaning cars. The said improvements were made at different times during the six months after taking possession of said premises, and aggregated in amount five hundred dollars.

Plaintiff paid the taxes upon the premises in dispute that were due and payable prior to the first Monday in March, 1899, and defendant paid the taxes on behalf of the Los Angeles Pacific Railroad Company thereafter.

“Plaintiff returned from her visit to Canada on the 5th day of November, 1898, and was informed on that day that Maurice Baillarge, her husband, had abstracted the deed from her to him from her said trunk and had conveyed the premises to Nordholt, and that Nordholt had transferred the said premises to Smith, for the Los Angeles Pacific Railroad Company, and that the railroad company had entered into the possession thereof and laid its tracks thereon, and that the said railroad company was using the same as its property; and that no notice (except such notice, if any, as the above facts impart) was given by plaintiff to defendant, or by defendant to plaintiff, or the Los Angeles Pacific Railroad Com-

pany, or to any one for them, or either or any of them, of their claim or rights in and to the property in dispute (except such knowledge and notice, if any, as is given and imparted by the facts aforesaid) until the commencement of this action.

"Neither W. F. Nordholt nor A. I. Smith, nor defendant E. P. Clark, nor the Los Angeles Pacific Railroad Company, had any knowledge or notice until the commencement of this action (unless the facts in the previous findings stated impart notice) that plaintiff was the owner, or claimed to own, or had any interest in the premises in dispute."

From these facts so found the court rendered judgment in favor of the defendant.

The contention on the part of the appellant is, that the deed from the plaintiff to her husband, Maurice Baillarge, was never delivered, and therefore never became operative as a conveyance. The respondent, on the other hand, replies that, admitting the deed was never delivered so as to take effect between the parties thereto, from the facts found by the court the plaintiff is estopped, and the judgment in favor of the defendant should be affirmed; and in this we think the respondent is correct.

It is found that Nordholt received the deed from the appellant's husband to the premises in dispute September 9, 1898, and conveyed the premises to Smith October 26, 1898, and that ten days thereafter appellant returned from Canada, and was then informed that the deed had been taken from her trunk, and that her husband had made the conveyance in question, and that nearly a month thereafter Smith conveyed to the defendant Clark, for the benefit of the railroad company, as stated, which company had entered into possession and commenced making improvements thereon, which continued six months thereafter and aggregated five hundred dollars; that the plaintiff gave no notice whatever, nor made any indication of her claim to the property until the commencement of the action, nearly three years after her return from Canada, and after being informed of the whole transaction.

If the plaintiff did not approve of the transaction on the part of her husband, it was her duty, when informed of the same, to promptly repudiate what had been done by her husband in the premises. Instead, however, it appears that no notice whatever was given or steps taken to inform the de-

fendant that she disapproved of the transaction until the commencement of the action, nearly three years after becoming acquainted with all the facts.

It is laid down as one of the maxims of the law that "He who can and does not forbid that which is done on his behalf is deemed to have bidden it." (Civ. Code, sec. 3519.) In *Quick v. Milligan*, 108 Ind. 419,¹ the appellant, in conjunction with her husband, signed and acknowledged a conveyance of her interest in the land in question to one Etchison, and sent such conveyance to her sister, with instructions to deliver it only upon the condition that he pay the amount of the purchase money in question. In violation of these instructions, however, the sister delivered the deed to the grantee named in it, without the payment of the purchase money. In that case, it was contended, on behalf of the plaintiff, that the deed, having been delivered in violation of the condition imposed by the said plaintiff, did not become effective. The court, after admitting to the full extent the abstract proposition as stated to be correct,—that a deed delivered in escrow is not effective if placed in the hands of the grantee in violation of a condition upon which the person who holds in escrow is authorized to deliver it,—however, decided the case against the appellant, and in favor of the defendant, the purchaser from Etchison, on the ground of estoppel,—to wit, that where one of two innocent persons must suffer he through whose agency the loss occurred must sustain it (citing a number of authorities to that effect).

In *Beardsley v. Clem*, 137 Cal. 328, the plaintiffs owned a tract of land near Redlands, and the defendants owned a tract near Downey, and exchanged deeds for the same on December 1, 1898, in pursuance of a verbal agreement previously entered into. On the night of November 30, 1898, a house which stood on defendants' land was destroyed by fire, but it was found that at the time the deeds were exchanged the parties believed that the dwelling was on the land; that the existence of the dwelling-house was an inducement to the plaintiffs and a part of the consideration moving to them in the transaction, and that had plaintiffs known of the destruction of the house they would not have made the exchange. On December 19th plaintiffs served notice of a rescission and demanded a recon-

¹ 58 Am. Rep. 49.

veyance, but prior to that time, and after the exchange of the deeds, defendants had placed permanent improvements on the land taken by them of the value of three hundred and fifty-nine dollars, and expended eighteen dollars for cultivating and irrigating said lands, and forty dollars paid to the plaintiffs' intestate and one of the parties who made the exchange, for fertilizing material left on the premises conveyed to the defendants. The court below held, that, although the plaintiffs had the right to rescind in view of the mutual mistake, they were yet estopped by subsequent conduct; that the acts and conduct of plaintiffs' intestate indicated that he did not intend to rescind, and rather encouraged the defendants in the work performed and expenditures made, adding, "These things created an equitable estoppel, because it is unconscionable for a party to permit another to so improve property obtained in such a bargain, and then claim the property and improvements, even were he to pay the costs of the improvements"; and this court, after citing a number of authorities bearing upon the question of estoppel, affirmed the judgment.

In *Alexander v. Welcker*, 141 Cal. 302, the note and mortgage sued on were executed by the defendant (appellant) and her husband (W. T. Welcker) in his lifetime—the title to the mortgaged premises being in the appellant alone. The court finds that after executing the mortgage with her husband she exacted a promise from him as to the delivery of the note and mortgage at the time she intrusted the same to him, but that he never at any time informed the mortgagees (under whom plaintiff claimed) of the promise he had made to defendant, and they had no notice or knowledge thereof. It was contended in that case by the appellant, as here, that there was no legal delivery of the mortgage to the mortgagees. This court, however, in the opinion affirming the judgment, says: "Under the circumstances the appellant is clearly estopped from denying the delivery of the mortgage."

The reasons for the application of the old rule of equitable estoppel are equally as cogent in the case at bar.

Judgment affirmed.

Beatty, C. J., Lorigan, J., Henshaw, J., Shaw, J., and Angellotti, J., concurred.

Rehearing denied.

[S. F. No. 3353. In Bank.—December 24, 1904.]

ELEONORA KALTSCHMIDT, Appellant, v. ADOLPH H. WEBER, Executor, etc., Respondent.

BILL OF EXCEPTIONS—PRESENTATION FOR SETTLEMENT—MISTAKE AS TO TIME—EXCUSABLE INADVERTENCE.—A mistake of one day in giving eleven days' notice by plaintiff of the presentation of a bill of exceptions for settlement after the service of proposed amendments thereto does not make the settlement thereof erroneous where a proper case for relief under section 473 of the Code of Civil Procedure was established by affidavits and by all the circumstances of the case clearly showing that the mistake was the result of an excusable inadvertence on the part of plaintiff's attorney.

ACTION AGAINST EXECUTOR—SERVICES OF MARRIED WOMAN AS NURSE—NONSUIT—EVIDENCE—AGREEMENT FOR SEPARATE PROPERTY—PREJUDICIAL ERROR.—In an action by a married woman against an executor upon a contract for services rendered by her to the deceased testator in his lifetime as nurse and attendant, where a nonsuit was granted for the main reason that there was no evidence of any agreement between her and her husband to the effect that her personal earnings should be her separate property, it was prejudicial error to refuse to permit evidence by the husband tending to establish such agreement.

ID.—INCOMPETENT EVIDENCE OF PLAINTIFF.—The testimony of the plaintiff concerning the course of conduct of herself and husband with respect to her earnings, relating to matters of fact which must have taken place in the lifetime of the deceased employer, was properly excluded as inadmissible under subdivision 3 of section 1880 of the Code of Civil Procedure.

ID.—HUSBAND AND WIFE—GIFT OF COMMUNITY PROPERTY—SEPARATE PROPERTY—CONSTRUCTION OF CODE.—The husband may make a gift of community property to the wife, the effect of which is to transmute it into her separate estate. Section 172 of the Civil Code, forbidding the husband to make a gift of community property without the consent of the wife in writing, is for her benefit, and has no application to a gift by the husband directly to the wife.

ID.—AGREEMENT AS TO PERSONAL EARNINGS—CHANGE OF STATUS.—The husband may, under sections 158 and 159 of the Civil Code, agree with the wife that her personal earnings, both past and future, shall be her separate property, the effect of which agreement is to convert them from the status of community property to that of the wife's separate property.

ID.—PROOF OF AGREEMENT—MANAGEMENT AND CONTROL OF WIFE'S EARNINGS—EVIDENCE IMPROPERLY EXCLUDED.—Where the husband

testified that he had had an understanding with his wife ever since their marriage as to the control and management of her earnings it was prejudicial error to refuse to allow him to testify as to who had had the management and control of his wife's earnings for a specified period, and not to allow him to testify as to the effect of the agreement or understanding between them. The conduct and actions of the husband with respect to such earnings, indicating that he did not regard them as community property, or that he had relinquished to her the right to control and dispose of her receipts from that source, were competent and admissible evidence to prove the agreement.

ID. — UNNECESSARY AMENDMENT TO COMPLAINT — ADMISSIBILITY OF PROOF.—It was not necessary to amend the complaint so as to allege an agreement of the husband and wife that her earnings should be her separate property in order to render proof thereof admissible. Such proof was admissible under the averment of the original complaint that the deceased was indebted to her for the services in question.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

Arthur H. Barendt, Charles E. Naylor, and William P. Hubbard, for Appellant.

Alexander D. Keyes, for Respondent.

SHAW, J.—This is an appeal from an order denying the plaintiff's motion for a new trial.

The court did not err in settling the bill of exceptions, notwithstanding the fact that the day fixed for the presentation thereof in the notice given by the plaintiff was eleven days after the defendant had served his proposed amendments thereto. It was clearly shown by the affidavits and by all the circumstances of the case that the mistake of one day in fixing the time was the result of an excusable inadvertence on the part of plaintiff's attorney, and this made a proper case for relief under section 473 of the Code of Civil Procedure.

The plaintiff was a married woman, and the action was on a contract for services alleged to have been rendered by her to the deceased in his lifetime as nurse and attendant upon him. The defendant denied the allegations of the complaint,

and alleged affirmatively that the indebtedness sued on was community property of the plaintiff and her husband, and that there was a defect of parties, by reason of the fact that the husband was not made a party plaintiff. At the close of the testimony a motion by the defendant for a nonsuit was granted.

The plaintiff urges with much persistence that there was sufficient evidence to justify findings in her favor, and hence that the motion for nonsuit should not have been granted. In view of the conclusions that we have reached upon the rulings of the court rejecting certain evidence offered by the plaintiff, we think it unnecessary to decide the question as to the sufficiency of the evidence. One ground of the motion for nonsuit was, that the indebtedness sued on accrued during the marriage of the plaintiff and her husband, and that there was no evidence of any agreement between her and her husband to the effect that her personal earnings should be her separate estate. This appears to have been one of the main reasons for granting the nonsuit. It follows that the exclusion of any evidence tending to show that such earnings were not community property would be prejudicial error.

The testimony of the plaintiff concerning the course of conduct of herself and husband with respect to her earnings was properly excluded. It related to matters of fact which must have taken place in the lifetime of the deceased, and therefore it would be inadmissible under the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure. (See *Stuart v. Lord*, 138 Cal. 672.)

The husband of the plaintiff testified in her behalf that he had had an understanding with her ever since their marriage as to the control and management of her earnings. He was then asked the question: "Who has had the management and control of your wife's earnings during the past fifteen years?" The objection that this question was incompetent, irrelevant, and immaterial was sustained, and in this we think the court erred. Other questions as to whether or not he had himself had the management or control of such earnings or had consented at all times to the control and disposition thereof by his wife, or had ever objected to her management and control thereof, and as to what she did with her earnings, and what the agreement was between them with respect

thereto, were put to him, and upon objections, chiefly to the form of the questions, the witness was not allowed to answer, and the result of the entire effort of counsel on this subject was, that no testimony of this character was obtained from the witness. It may be admitted that the other questions mentioned were objectionable in form, although, owing to the apparent dullness of the witness, the court should have been more liberal in its rulings in this regard. But the question above quoted was not subject to this objection, nor did it call for the conclusion of the witness, at least not to such an extent as to make it objectionable for that reason, and it should have been allowed. There can be no doubt that the husband may make a gift of the community property to the wife, and that the effect of such gift will be to transmute it into her separate estate. The provision in section 172 of the Civil Code, that he cannot make a gift of community property unless the wife, in writing, consent thereto, is a provision for her benefit and protection, and it has no application to the case of a gift by the husband directly to the wife. And so, also, he may, under sections 158 and 159 of the Civil Code, contract with her by an agreement that her personal earnings shall be her separate property, and this may apply to future as well as past earnings, and the effect of such an agreement will be to convert such earnings from the *status* of community property to that of separate property of the wife. (*Wren v. Wren*, 100 Cal. 276.¹) Now, it may well have been the case that the husband could recall no conversation between them in which such an agreement was distinctly expressed. His testimony strongly indicates this condition of memory. And yet it might also be true that the fact that there was such an agreement was perfectly well understood between them. In such a case resort may be had to circumstantial evidence. The conduct and actions of the husband with respect to such earnings, indicating that he did not regard them as community property, or that he had relinquished to her the right to control and dispose of her receipts from that source, would be competent evidence and admissible to prove the agreement. It had been shown that the plaintiff had been for more than twenty years keeping a lodging-house in San Francisco; that she had rented the house herself, had collected all the rents, and had

¹ 38 Am. St. Rep. 287.

managed the disbursement of all funds in relation thereto; and that the services sued for had been rendered to the deceased by the plaintiff while he was an inmate of her house as a lodger and boarder. The husband testified, as above stated, that he had made an agreement with her concerning her earnings, but was not allowed to state the effect of that agreement. If, in connection with all these facts, the plaintiff had been allowed to prove that during the twenty-two years of their married life the wife had had exclusive and undisturbed control of her earnings, treating the same as her own property, and disposing of them as she pleased, without consulting her husband, such evidence would certainly tend to prove an understanding between them that such earnings were to be her own separate estate. The question tended directly to elicit evidence of such facts, and if answered as the plaintiff manifestly expected, it would have produced competent and material evidence in her behalf.

The amendment to the complaint, inserting an allegation that there was an agreement between the plaintiff and her husband that her earnings should be her separate property, which amendment was made after this question was excluded, was not necessary as a foundation for testimony of that character. Before that amendment was made, the complaint contained a statement that the deceased was indebted to her for the services in question. Under this allegation she was entitled to introduce evidence of an agreement whereby her earnings during the marriage should be her separate estate, and thus show that the indebtedness was to her and not to her husband.

The order denying a motion for a new trial is reversed and the cause remanded.

Angellotti, J., Van Dyke, J., Lorigan, J., McFarland, J., Henshaw, J., and Beatty, C. J., concurred.

Rehearing denied.

[S. F. No. 2944. Department Two.—December 27, 1904.]

CHARLES G. WILLEY, Appellant, v. THE BENEDICT COMPANY, Respondent.

SUMMONS—SUBSTITUTED SERVICE—JURISDICTION OF DEFENDANT—CONDITIONS—RETURN.—A substituted service of summons in an action purely in *personam* is a radical departure from the ordinary method of procedure whereby jurisdiction is obtained over the defendant, and the authority to make it must be strictly followed, and the existence of the conditions upon which such service depends must be shown affirmatively by the return.

Id.—SERVICE UPON FOREIGN CORPORATION—LEAVING COPY WITH SECRETARY OF STATE—INSUFFICIENT RETURN—CONDITION NOT SHOWN.—A sheriff's return of the service of summons upon a foreign corporation doing business in this state, by leaving a copy of the summons and complaint with the secretary of state, which wholly fails to show the necessary condition that the records in the office of the secretary of state disclose that no person has been designated by the corporation for that purpose, is insufficient to show jurisdiction of the defendant and to support a judgment by default.

Id.—SPECIAL APPEARANCE—MOTION TO QUASH SERVICE AND VACATE JUDGMENT—WANT OF JURISDICTION.—Upon the special appearance of the defendant corporation for that purpose its motion to quash the service of the summons and to vacate the judgment by default for want of jurisdiction of the defendant appearing upon the record was properly granted.

Id.—CERTIFICATE OF SECRETARY OF STATE NOT PART OF RETURN OR RECORD.—A certificate by the secretary of state attached to the returned summons that the defendant corporation had designated no person upon whom service might be made is not provided for by statute as evidence of that fact in aid of the sheriff's return, and is not part of its return or of the record of the judgment by default, and cannot be considered for any purpose upon a motion made upon the record to quash the service and vacate the judgment.

Id.—APPEAL—ORDER GRANTING MOTION—AFFIDAVITS NOT PART OF RECORD.—Where none of the affidavits, or the substance of them, offered by the plaintiff upon the defendant's motion to quash the service of the summons and to vacate the judgment by default, and not admitted in evidence, were made part of the record upon appeal from the order granting the motion, the refusal to admit them in evidence cannot be considered.

APPEAL from an order of the Superior Court of the City and County of San Francisco quashing the service of sum-

mons and vacating a judgment by default. Thomas F. Graham, Judge.

The facts are stated in the opinion of the court.

Franklin P. Bull, for Appellant.

Rigby & Rigby, and Waldemar J. Tuska, for Respondent.

LORIGAN, J.—The plaintiff, as assignee of one Lea Bleakmore, on December 22, 1900, brought an action in the superior court of San Francisco against the defendant, a foreign corporation, to recover the value of personal services alleged to have been rendered it by Bleakmore, and had certain property of the defendant attached.

Summons was issued, directed generally to "The Benedict Company (a corporation)," and delivered to the sheriff of Sacramento County, who, in due time, returned that he had served it upon the defendant, "a foreign corporation, doing business in the state of California, defendant therein named, by handing to and leaving with C. F. Curry, secretary of state of the state of California, a copy of said summons" having attached thereto a copy of the complaint.

On March 14, 1901, the default of the defendant having been theretofore entered, on motion, judgment was rendered in favor of plaintiff against the defendant for \$3,488.75, the amount claimed.

On April 19th following, the defendant appearing specially for that purpose, and upon due notice given, moved the court to vacate the service of the summons and complaint, and to set aside the default and the judgment entered, on several grounds, one of which was that the court had acquired no jurisdiction of the person of defendant, as there had been no legal or valid service on it of the summons and complaint. This motion was based, and its hearing had, solely upon the record in the case, and the court having thereafter granted the order as prayed for, plaintiff appeals.

While, as stated, several grounds were urged in the lower court in support of the motion to quash the service of the summons and vacate the judgment, and they are all equally insisted on here to sustain the order, we think the matter may be disposed of upon a consideration of the question solely

whether the return of the sheriff under which jurisdiction of the defendant was assumed, was sufficient in law to give the superior court jurisdiction of defendant. If not, the order of the lower court must be affirmed.

The service of the summons was made, and its sufficiency is attempted to be sustained under the provisions of section 1 of an act amending "An act in relation to foreign corporations," passed in 1899 (Stats. 1899, p. 111), which provides, in effect, that every foreign corporation doing business in this state shall, within a specified time after commencing business here, designate some person residing in the state upon whom process may be served, and file such designation in the office of the secretary of state, in which case it shall be lawful to serve the process upon such designated person, and, in the event no such person is designated, then service shall be made on the secretary of state.

It will be noted that this provision is a radical departure from the ordinary method of procedure whereby jurisdiction is obtained over a defendant, and for that reason, having due regard for the protection of the personal and property rights of a defendant, before a court can assume jurisdiction of him under the substituted process it provides for, a strict compliance with its provisions must be insisted on.

It is said: "Substituted service in actions purely *in personam* is a departure from the rule of common law, and the authority for it must be strictly followed. Therefore, the existence of the conditions upon which the validity of such service depends must be shown affirmatively by the return and cannot be inferred." (18 Ency. of Plead. & Prac. 932.)

Now, to apply this rule to the substituted service of the summons in the case at bar, as the return of the sheriff discloses it to have been made:

It will be observed that section 1 of the statute above referred to requires every foreign corporation doing business in this state to designate, by filing such designation in the office of the secretary of state, a person upon whom process may be served, and when so designated the process shall be served on him, and it then declares that where no such person is designated the required service may be made upon the secretary of state. It provides, in any event, for the service upon some one, but as to that service, in as far as making it

on the secretary of state is concerned, the statute prescribes a condition,—namely, that the records of the office of the secretary of state disclose that no person has been designated by the corporation for that purpose. If there is a designated person, service must be made on him; if there is none, then on the secretary of state,—but the right to serve the latter is conditioned solely on the non-existence of the former.

When we examine the return of the sheriff (and we have recited above its essential particulars), we find an entire absence of any recital upon the subject, as to whether the defendant foreign corporation had filed any designation of a person to be served. The only statement is, that he served the summons on the secretary of state. But as by the terms of the statute there was no authority to serve the secretary of state, unless it appeared that there was no designation of a person on file in his office, the return of the sheriff should have shown the existence of this condition, upon which alone service on the secretary of state could be either authorized or sustained. If it was a fact that no designation had been made, it should have been contained in his return, and his failure to so make it renders the return insufficient to show that any such service had been made as would give the court jurisdiction of the defendant.

In *Works on Courts and Their Jurisdiction* (p. 291) it is said: "Where service is allowed on one person only where some other person cannot be found, the proof of service must, where service is made on the second person, show that the first could not be found. In other words, where service is allowed to be made on a particular person or officer only on condition, the return must show the existence of the condition, or it is insufficient."

In Nevada a statute of that state similar to ours provided that, in a suit against a foreign corporation doing business there, service of process might be made upon the secretary of state, in the event of a failure of such corporation to appoint and keep an agent within that state upon whom service might be made. In *Brooks v. Nickel Syndicate*, 24 Nev. 325, passing upon the validity of a judgment of default upon substituted service, where the record showed, from the return of the sheriff, that he had served the summons on the secretary of state, but his return did not show that the corporation

had not appointed an agent within the state upon whom service might be made under the act, it was held that the return was insufficient to give the court jurisdiction. It was there said: "The statute of 1889, under which service of summons was made in the case at bar, authorized such service upon the secretary of state in the event of the failure of the appellant to appoint and keep an agent within this state, upon whom such service could be made, and such facts should be affirmatively shown by the record." To the same general effect are *Cairo and Fulton R. R. Co. v. Trout*, 32 Ark. 23; *Glins v. Supreme Sitting Order of Iron Hall*, 22 N. Y. Civ. Prac. Rep. 437; 20 N. Y. Supp. 275.

It is insisted, however, that in the case at bar the fact that the defendant corporation had designated no person upon whom service might be made appeared from the certificate of the secretary of state to that effect, which was attached to the summons as returned. But, in the first place, the statute does not provide for any certificate of the secretary of state as evidence of that fact in aid of the sheriff's return or otherwise, and in the second, if it could be availed of at all, it does not pretend to be, and is no part of, the return of the sheriff, nor is it any part of the record, which in cases of judgments by default, consists of the summons, with affidavit or proof of service, the complaint, with a memorandum indorsed thereon of the entry of defendant's default, and a copy of the judgment. (Code Civ. Proc., sec. 670, subd. 1.) As the motion to quash was made solely on the record, and as this certificate was not part of it, it is unavailing for any purpose.

It is further insisted by appellant that the court erred in refusing to admit in evidence the affidavits of certain persons offered by him on the hearing of the motion. But as none of these affidavits, or the substance of them, appear in the transcript, there is nothing upon which appellant's point in regard to them can be considered.

We are satisfied, for the reasons given, that the order of the superior court vacating the service of the summons and setting aside the judgment was properly made, and is therefore affirmed.

McFarland, J., and Henshaw, J., concurred.

[No. 19,654. Department One.—December 27, 1904.]

**HARRY D. MEACHAM, Respondent, v. BEAR VALLEY
IRRIGATION COMPANY, Appellant.**

EJECTMENT—REPORTER'S PER DIEM—RULE OF COURT—FAILURE OF DEFENDANT TO OBEY ORDER—JUDGMENT WITHOUT TRIAL—POWER OF COURT.—The superior court had no power, for the mere failure of the defendant in an action of ejectment to obey its order for the immediate deposit of one half of the per diem of the reporter, as fixed and required by a rule of court, to order judgment for the plaintiff for recovery of the land of which the defendant was in possession without any trial of the cause, and without any evidence of plaintiff's right thereto, or affording to the defendant an opportunity to reply to any evidence the plaintiff might adduce.

ED.—CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—The guarantee of the constitution that the defendant shall not be deprived of his property without due process of law gives him the right to be heard in its defense against any claim that may be made against him for its possession; and he cannot be deprived of this right of defense as a penalty for failure to comply with a rule of the court or for failure or refusal to pay any part of the costs of the action in advance of a trial.

ED.—AMBIGUITY IN COMPLAINT—"POSSESSION"—SPECIAL DEMURRER.—Where the complaint in ejectment alleged that at the time of the commencement of the action the plaintiff was the owner of "and in possession" of an entire tract of land therein described, and also alleged that for about one year prior thereto the defendant had been, and now is, unlawfully "in the possession," without any right or title, of a described part of the premises, and unlawfully withholds the same from the plaintiff, a special demurrer to the complaint for ambiguity as to the averments of possession should have been sustained.

APPEAL from a judgment of the Superior Court of San Bernardino County. John L. Campbell, Judge.

This case was appealed in 1894, and dropped from the calendar in 1895, and restored in 1904. Further facts are stated in the opinion.

G. E. Harpham, for Appellant.

Charles J. Perkins, for Respondent.

HARRISON, C.—Action for the recovery of real property in the county of San Bernardino.

A trial by jury of the issues in the above-entitled action was waived by the parties, and when the cause came on for trial the plaintiff's counsel read the verified complaint and answer and called a witness to the stand, who was duly sworn by the clerk, whereupon the court made the following order: "This cause having been called for trial and the pleadings read, and under the rule of court the parties were requested to deposit with the clerk each one half of the reporter's per diem to abide the result of this suit, and the reporter refusing to report the testimony unless the fees are paid, and the defendant refusing to comply with the order of the court, and the court deeming that this is a case where it is necessary to have a reporter, as it involves the examination of several witnesses orally: It is therefore ordered that the defendant deposit the fee of the reporter within five minutes, or a judgment will go for plaintiff as prayed for." The defendant's counsel thereupon stated to the court that the defendant had no money with which to comply with the direction, and that he excepted to the order. Prior to this time the superior court of that county had adopted a rule, which was then in force, fixing the compensation of its official reporter at seven dollars per day, and declaring that "The per diem herein fixed shall, upon the opening of court and before the taking of notes by the reporter, be deposited, one half thereof by the respective parties, with the clerk of the court for the use and benefit of said reporter, said amount to be thereafter taxed as costs by the party in whose favor judgment is rendered." Upon the expiration of the time named in the order, and the defendant having failed to deposit the reporter's fee as required by the order, the court, without any trial of the cause, ordered judgment to be entered in favor of the plaintiff, and thereupon judgment was entered in his favor for the recovery from the defendant of the possession of the property described in the complaint. From the judgment thus entered the defendant has appealed.

The judgment thus entered by the court cannot be sustained. It was not within the power of the court to render a judgment giving to the plaintiff the right to property of which the defendant was in possession, without any evidence

of such right, or affording to the defendant an opportunity to reply to whatever evidence the plaintiff might adduce. The failure or refusal of a defendant to pay the costs of an action, or any portion thereof, in advance of a trial, does not authorize the court to deprive him of his defense to the action. The guarantee of the constitution that he shall not be deprived of his property without due process of law gives him the right to be heard in its defense against any claim that may be made against him for its possession; and he is not to be deprived of this right as a penalty for failing to comply with some rule of court. (See *Foley v. Foley*, 120 Cal. 33;¹ *Younger v. Superior Court*, 136 Cal. 682.) Not only has the legislature not attempted to vest the court with such authority, but in section 274 of the Code of Civil Procedure, under which the reporter's right to compensation is derived, as that section stood at the time the judgment herein was rendered (Amendments of Codes, 1880; Code Civ. Proc., page 54), the legislature has expressly declared: "The reporter's fees for taking notes in civil cases shall be paid by the party in whose favor judgment is rendered and shall be taxed up by the clerk of the court as costs against the party against whom judgment is rendered." The amendment of this section in 1885 (Stats. 1885, p. 218), requiring each party to pay the reporter's per diem before judgment or verdict is entered, was held unconstitutional. (See *Stevens v. Truman*, 127 Cal. 155.) If upon the refusal of the defendant to comply with the order of the court, the plaintiff had desired a trial of the cause, he could have deposited with the clerk the whole of the reporter's per diem, and, if he had obtained judgment, included the amount in his cost-bill. but he was not authorized to take judgment in his favor without a trial of the issues. In *Adams v. Crawford*, 116 Cal. 495, it was held that if the plaintiff, after demanding a jury, did not comply with a rule of the court requiring a deposit of the jury fee, the court did not err in refusing his demand and trying the case without a jury; but there is nothing in the opinion therein which justifies the action of the court in rendering a judgment without any trial.

The court also erred in overruling the defendant's demurrer to the complaint. The complaint alleges that at the time of

¹ 65 Am. St. Rep. 147.

the commencement of the action the plaintiff was the owner of and in *possession* of the entire tract of land therein described; and it also alleged that for about one year prior thereto the defendant "had been and now is" unlawfully in the *possession*, without any right or title, of a portion of the above-described premises, and unlawfully withholds the same from the plaintiff—describing the portion so withheld. The defendant demurred to the complaint for ambiguity, pointing out in its demurrer these averments as the particulars in which it was ambiguous, and its demurrer should have been sustained.

The judgment should be reversed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is reversed.

Van Dyke, J., Shaw, J., Angellotti, J.

[Crim. No. 1181. Department One.—December 29, 1904.]

THE PEOPLE, Respondent, v. JAMES COLEMAN, Appellant.

CRIMINAL LAW—PREVIOUS CONVICTION—INCREASED PUNISHMENT—CONSTITUTIONAL LAW—AGGRAVATED OFFENSE.—The increased punishment on account of a previous conviction of a former offense, as provided in section 666 of the Penal Code, and the proceedings to be had upon arraignment under section 988 of that code, and upon verdict, in reference to such prior conviction, under section 1158 of that code, are not violative of any provision of the constitution, state or federal. The increased punishment is not for the prior conviction, but solely for the aggravation of a second offense, which merits a greater punishment.

10.—DISCRIMINATION—DUE PROCESS OF LAW.—Where the defendant was arraigned and tried in the same manner as any other defendant who has suffered a previous conviction is arraigned and tried, he is not discriminated against or deprived of due process of law.

11.—PREVIOUS CONVICTION A QUESTION OF FACT—PLEADING—ISSUE—PROVINCE OF JURY.—The previous conviction is a question of fact material to the aggravated offense for which the defendant is tried,

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which must be pleaded, and where issue is joined thereupon, either by plea of not guilty or by standing mute, which amounts to the same thing under the Penal Code, it must be proven as any other material fact upon the trial of the case; and it is the province of the jury to pass thereupon, under section 1158 of the Penal Code.

ID.—CONFESSION OF PREVIOUS CONVICTION—RIGHTS OF DEFENDANT.—

The defendant has it in his power to avoid bringing the fact of previous conviction before the jury by confessing the same by his plea at the time of arraignment before the court.

APPEAL from a judgment of the Superior Court of Los Angeles County. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

Adam Dixon Warner, for Appellant.

U. S. Webb, Attorney-General, and R. C. Van Fleet, for Respondent.

VAN DYKE, J.—This is an appeal from a judgment sentencing the defendant to fifteen years in the penitentiary for the crime of robbery, with a former conviction of robbery. The information alleged a prior conviction of robbery on the eleventh day of March, 1892, and the new offense of robbery committed on the twenty-fifth day of November, 1903. On the arraignment of the defendant he stood mute as to said prior conviction of robbery as charged in said information, and the plea of not guilty was entered on the record by the clerk, whereupon the defendant entered a plea of not guilty of robbery as charged in the information, as committed on the twenty-fifth day of November, 1903.

The appeal is taken on the ground that the defendant did not have a fair and impartial trial, as intended by the constitution of the United States and of the state of California, for the reason that the trial was conducted under the provisions of sections 666, 988, and 1158 of the Penal Code. These sections read as follows:—

“Section 666. *Second offense, how punished after conviction of former offense.* Every person who, having been convicted of petit larceny, or of any offense punishable by imprisonment in the state prison, commits any crime after such conviction, is punishable therefor as follows:

"1. If the offense of which such person is subsequently convicted is such that, upon a first conviction, an offender would be punishable by imprisonment in the state prison for any term exceeding ten years, such person is punishable by imprisonment in the state prison not less than ten years.

"2. If the subsequent offense is such that upon a first conviction, the offender would be punishable by imprisonment in the state prison for five years, or any less term, then the person convicted of any such subsequent offense, is punishable by imprisonment in the state prison not exceeding ten years.

"3. If the subsequent conviction is for petit larceny, then the person convicted of such subsequent offense is punishable by imprisonment in the state prison not exceeding five years."

"Section 988. *Arraignment, how made.* The arraignment must be made by the court, or by the clerk or district attorney under its direction, and consists in reading the indictment or information to the defendant and delivering to him a copy thereof, and of the indorsements thereon, including the list of witnesses, and asking him whether he pleads guilty or not guilty to the indictment or information."

"Section 1158. *Jury may find upon charge of previous conviction.* Whenever the fact of a previous conviction of another offense is charged in an indictment or information, the jury, if they find a verdict of guilty of the offense with which he is charged, must also, unless the answer of the defendant admits the charge, find whether or not he has suffered such previous conviction. The verdict of the jury upon a charge of previous conviction may be: 'We find the charge of previous conviction true,' or 'We find the charge of previous conviction not true,' as they find that the defendant has or has not suffered such conviction."

Similar provisions have been contained in the statutes of various states for many years, and they have been uniformly sustained by the courts. (*Moore v. Missouri*, 159 U. S. 676.) Penal laws are not so much for the punishment of the offender as for the protection of society; and experience has shown that the persistent and hardened offender is more dangerous to society than a person who has committed but one offense, and that a severer punishment is demanded in such case, the better to protect society. Appellant's counsel in his reply brief says: "It may be admitted that the prior conviction

constitutes the subsequent violation of the law an 'aggravated offense,' for that, we may admit, is the meaning and intent and the force and effect of section 666, with which we have no quarrel." But he claims that this matter of aggravation is for the information of the court alone, and with which the jury has no concern and nothing to do. It may be replied to this that the former conviction is a fact, and a very important one, which constitutes or goes to make up this aggravated offense, and being a material fact in the case, necessarily it must be pleaded, and if issue be joined in reference thereto, either by plea of not guilty or by standing mute, which amounts to the same thing under the Penal Code, that material fact must be proven as any other material fact in the trial of the cause. In *People v. King*, 64 Cal. 340, in a like case, this court says: "But the charge of the previous conviction which entered into and made part of the aggravated offense, was one to which the accused had the right to plead, and for which he had the right to be tried as in other cases. In such a case he is not being tried for a separate offense as intimated by appellant's counsel, but, as already stated, the fact of the former conviction is a part of the offense upon which he is being tried." In *People v. Stanley*, 47 Cal. 114,¹ it was claimed, as here, that if the punishment for the second offense be increased because of a prior conviction for another offense, the accused would be twice punished for the same offense, to which this court replies: "The ready answer to the proposition is, that he is not again punished for the first offense, but the punishment for the second is increased, because by his persistence in the perpetration of crime he has evinced a depravity which merits a greater punishment, and hence to be restrained by severer penalties than if it were his first offense." It is again contended on behalf of the appellant, that it is a discrimination and destruction of the uniform operation of the general laws in the trial of a case like this, and that the jury is prejudiced in advance from the fact of the reading of the indictment charging him with the previous conviction, and that thereby defendant is compelled to be a witness against himself. To this it might be replied that the defendant has it in his power to avoid bringing before the jury the fact of a previous con-

¹ 17 Am. Rep. 401.

viction, by confessing such previous conviction at the time of the arraignment before the court. Section 1093 of the Penal Code directs that after the jury is impaneled and sworn, the indictment or information is read to the jury, "and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction."

The provisions of the Penal Code and the practice thereunder in reference to cases of previous convictions are not in conflict with the provisions of the constitution of the United States or of this state.

In *Moore v. Missouri*, 159 U. S. 676, the indictment charged that defendant, on the eleventh day of January, 1877, in the city of St. Louis, in the criminal court therein, was duly convicted of the offense of grand larceny, and was sentenced by said court to imprisonment in the penitentiary for the term of three years, and was duly imprisoned in said penitentiary accordingly, and that thereafter he committed the offense of burglary and grand larceny on May 26, 1893. On being arraigned he pleaded not guilty. Among the grounds assigned on his motion for arrest of judgment was that the first offense was not included in the last offense, but was a separate and distinct offense, and that the statute upon which the indictment was founded was unconstitutional and void in that it violated the fourteenth amendment of the federal constitution and the bill of rights of the constitution of Missouri, in that it prescribed a second punishment for the same offense, and a different punishment for different persons for committing said offenses. The supreme court, however, held that these contentions were untenable, that the accused was not again punished for the same offense. "The punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself." (Citing with approval *Boss's Case*, 2 Pick. (Mass.) 165; *People v. Stanley*, 47 Cal. 113;¹ *Plumbly v. Commonwealth*, 2 Met. (Mass.) 413; *Johnson v. People*, 55 N. Y. 512, and a great number of other cases from various states.)

In *People v. Sickles*, 156 N. Y. 548, it is said in the opinion

¹ 17 Am. Rep. 401.

of the court: "Reason suggests that the persistent and hardened offender needs a severer punishment. The previous punishment having failed to reform him, his guilt, upon his further offending, is greater, and, being so, severer treatment is needed to compel him to reform his ways, and in furtherance of the effort to prevent crime. In enacting that, upon a conviction for a second offense, the punishment shall be one of greater severity, the legislature has acted in accordance with the dictates of a wise policy and has invaded no constitutional right. How can it be said that the defendant has not had due process of law? The statute announced the enhanced penalty, which he would incur by repeating his infraction of the laws against crime. The indictment charged him with the aggravated crime, and he was put upon his trial, under the charge of being for a second time an offender, and, therefore, liable to suffer a severer punishment. His sentence was pronounced, after he had been tried and found guilty by the verdict of a jury. The course of the administration of justice was regular in all respects. When it is said that the presumption of the defendant's innocence was destroyed by the introduction of proof of his former conviction, the proposition is based upon mere assumption, and it is the error in that assumption which affects the appellant's argument. The statute has not abrogated the rule as to the presumption of innocence."

The scope and meaning of the fourteenth amendment to the constitution were considered in *In re Kemmler*, 136 U. S. 436. The supreme court says in that case: "The fourteenth amendment did not radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a state. Protection to life, liberty, and property rests primarily with the states, and the amendment furnishes additional guarantee against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the states, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential

character of the national government, and granted or secured by the constitution of the United States." (Citing a number of former decisions by the same court.) And again in *Leeper v. Texas*, 139 U. S. 467, it is said: "That by the fourteenth amendment the powers of states in dealing with crime within their borders are not limited, except that no state can deprive particular persons, or classes of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice." (Citing a number of cases.)

The defendant in this case, as appears from the record, was arraigned and tried in the same manner as any other defendant who has suffered a previous conviction is arraigned and tried, and therefore he was not discriminated against or deprived of due process of law, as shown by the decisions already cited and many others from the various states that might be cited to the same effect.

Judgment affirmed.

Angellotti, J., and Shaw, J., concurred.

[S. F. No. 3053. Department Two.—December 31, 1904.]

CHARLES H. SMITH, Appellant, v. JOSEPHINE SMITH,
Respondent.

DIVORCE—CONDUCT OF TRIAL BY DEFENDANT IN PERSON—ILLNESS—REFUSAL OF CONTINUANCE—ORDER GRANTING NEW TRIAL—UNAVOIDABLE ACCIDENT.—In an action for divorce by the husband, where the wife in person conducted the trial, and upon a day to which it was adjourned was too ill to attend, and requested the court by letter to continue the case on that ground, which was refused upon objection of the plaintiff for want of a legal showing, an order granting a new trial upon the sole ground that it was shown by affidavits that illness prevented her attendance, without specifying whether

it was granted for abuse of discretion on the part of the court or on the ground of unavoidable accident preventing her attendance at the further hearing of the case upon adjournment, the order will be sustained upon the latter ground.

1a.—POLICY OF LAW—REASONABLE DILIGENCE OF DEFENDANT.—In divorce cases the policy of the law is to afford a full hearing on both sides, and to relieve the parties from a situation which prevented it; and the fact that the defendant was not an attorney, and hence unfamiliar with the rule of practice, may be taken into consideration with the other circumstances in the case in determining whether reasonable diligence was employed by her in presenting to the court in the manner she did the fact of her inability to attend the trial on the day to which it was adjourned. The facts disclosed show sufficient diligence, at least in an action of divorce, to obviate objection for want of it.

1d.—RECEIPT OF MONEY UNDER DECREE OF MAINTENANCE—DEFENDANT NOT ESTOPPED.—The receipt of money under a decree obtained by the wife in an action for maintenance, which was continued in force by the decree of divorce for the period of six months, cannot estop the defendant from assailing the decree of divorce on motion for new trial.

1d.—NOTICE OF INTENTION—SIGNATURE BY ATTORNEY NOT SUBSTITUTED—WAIVER OF OBJECTION.—The fact that the notice of intention to move for a new trial was not signed by a former attorney of record for the defendant who failed to conduct the trial, and was signed by an attorney not regularly substituted, is immaterial where objection on that ground was waived by the plaintiff by recognizing and treating such attorney as representing the defendant on the motion for new trial, and serving papers upon him as such.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a new trial. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Foshay Walker, and Peter F. Dunne, for Appellant.

Aylett R. Cotton, for Respondent.

LORIGAN, J.—This is an appeal by plaintiff from an order granting the defendant a new trial.

The action was for divorce, the pleadings being verified. The complaint charged extreme cruelty, and all its allegations were specifically denied by defendant in her answer.

When the case was called for trial in the lower court the defendant appeared *in propria persona*, and during several days, while the trial was in actual progress, and up to an adjournment on December 20, 1900, actually conducted the proceedings in her own behalf. At the close of the daily session of the court on December 20th, the evidence thus far being introduced on behalf of plaintiff, the case was continued, the further hearing to be resumed at ten o'clock December 24th. When the court resumed its session on this later date the judge announced that he was in receipt of a letter from the defendant, stating that she was sick and unable to be present, and that she wished him to continue the trial till some time in 1901. No one was then present appearing or representing the defendant. The attorney for the plaintiff refused to consent to any further postponement and objected that there was no sufficient showing to authorize it, and the trial was thereupon proceeded with, resulting, on the same day, in findings and a decree in favor of plaintiff being made and signed by the trial judge.

In due course the respondent moved for a new trial on various grounds, but particularly on account of alleged abuse of discretion on the part of the court in refusing to continue the further hearing of the cause, and in proceeding with the trial during her absence, while she was sick and unable to attend, and further on account of accident which ordinary prudence could not have guarded against, and which precluded her presence in court upon the day to which the adjournment had been had.

Without particularly discussing the evidence presented upon the motion under the affidavits, it unquestionably appears therefrom that after the adjournment of December 20th respondent became sick and was confined to her bed on the twenty-first, twenty-second, and twenty-third days of December; that on the morning of December 24th, though still ill, she attempted to prepare for her attendance at court, and while doing so she became dizzy and found herself so weak as to be hardly able to stand; that, realizing she would be unable to reach court, she sent by messenger a letter to the superior judge presiding at the trial, informing him that she was too ill to attend, and asked him to kindly continue the case.

Upon this showing the court granted her motion for a new trial, and stated in its order that the motion was granted "upon the sole ground that it appears that defendant was sick as alleged in her affidavit and in that of Ellen Sexton."

While this order is apparently specific enough, as far as it goes, it affords no information as to which particular ground of the motion the new trial was awarded on; whether for abuse of discretion on the part of the court, or because respondent was prevented by unavoidable accident from being present at the resumption of the trial.

This, however, we do not deem of particular moment because, while a vigorous attack is made upon the order, if treated as one granting a new trial for abuse of discretion on the part of the court, on the ground of insufficiency of the evidence to sustain it, and further, because the point could only be availed of upon a bill of exceptions or a statement of the case, and not by affidavits, yet we think the order can and should be sustained, as being based upon a sufficient showing of providential accident preventing the attendance of respondent at the further hearing of the case upon adjournment, and for which the code provides a new trial may be granted.

And while the sufficiency of the showing made by respondent in support of her motion on this ground is also questioned, we think it was sufficient to sustain the order of the court.

Under her motion, on this ground, the essential fact to be established was the unavoidable accidental interposition of sickness which prevented her attendance. This was, however, established to the satisfaction of the lower court by the affidavit of respondent and that of her landlady, the only evidence on the point presented at the hearing. Her illness was an unfortunate occurrence, the happening of which she could not prevent, and through the existence of which her rights should not be prejudiced, and it is from a judgment obtained against one under such circumstances that the code contemplates that relief shall be afforded by granting a new trial. It is insisted, however, that the respondent was wanting in reasonable diligence in calling the attention of the court to the fact of her illness, and her inability to attend at the

adjourned hour of trial, both in the method and the manner she adopted; that she should have presented an affidavit, or at least a certificate of a physician, or should have employed an attorney to prepare the necessary moving papers, represent her in court, and ask for a continuance. Undoubtedly, this would have been the better course to have pursued, and in ordinary actions where the conduct of proceedings is under the control of attorneys familiar with the rules of procedure and the method of preserving rights, would be requisite, but cases may occur where the circumstances show that but little opportunity was afforded a party litigant to adopt this method which involves some preparation and the lapse of time. Of course, it is no strong excuse that the respondent is not a lawyer, and, hence, was unfamiliar with methods of procedure, because that fact would not ordinarily relieve her from mistakes concerning rules of practice. But the cases are so exceptional in which a person acts as her own attorney that, at least in divorce cases, where the policy of the law is to afford a full hearing on both sides and to relieve the parties from a situation which prevented it, when it would not do so if property rights alone were involved, we think the fact that the defendant was not an attorney, and, hence, unfamiliar with rules of practice, may be taken into consideration in determining, with the other circumstances in the case, whether reasonable diligence was employed by her in presenting to the court, in the manner she did, the fact of her inability to attend the trial upon the day to which it was adjourned. When you add to this the other facts that, in truth, the respondent was too ill to attend on that day; that she had no attorney; that she had endeavored in the morning to prepare herself to attend court, and only failed to do so because she was too feeble; taking also into consideration the natural distress of mind under which she must necessarily have labored, proceeding from her anxiety to attend court and her inability to do so; the short time that probably intervened between her discovery that she would not be able to attend and the hour when the session of court commenced within which to send for and consult with a lawyer, or to have a notary attend in preparation of an affidavit, or to call a physician (she had none in attendance) and obtain his certificate, and that, under these circumstances, and in this

situation, she sent the letter to the court, explaining her condition, and asking a postponement of her trial, we think these facts disclose sufficient diligence, at least in an action for divorce, to obviate the objection urged.

In discussing this matter we have limited our consideration to the rule as applied to actions for divorce. It is a matter of public policy that divorces should only be granted where the fullest opportunity has been afforded both sides to be heard, and then only when adequate cause for divorce is shown. Whether such adequate cause exists can only be disclosed after both sides have had an opportunity to present all their evidence. The public has an interest in having no divorce granted excepting for good cause, and it is this consideration of public interest which has largely entered into the formulation by the courts of a more liberal rule to be applied in relieving from default in divorce cases than applies in other cases where property rights alone are involved. And while this rule has been applied more particularly in divorce cases, where the application to set aside a judgment by default was under consideration, the principle of public interest is as directly applicable to cases where, during the actual trial, the party has been precluded by unavoidable accident from presenting her case on the merits, and a motion for a new trial is made in order that she may do so, as in cases where relief from a default judgment is asked when the party had failed to appear at all. In the one case, as in the other, the opportunity has not been given to hear both sides of the case, or to permit the court to determine whether adequate cause for a divorce exists, and the same general condition prevailing, the same liberal rule should apply.

In *McBlain v. McBlain*, 77 Cal. 509, this court said: "The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for a divorce; the policy and the letter of the law concur in guarding against collusion or fraud; and it should be the aim of the court to afford the fullest possible hearing in such matter."

Subsequently, in *Wardsworth v. Wardsworth*, 81 Cal. 183,¹ where this court conceded that such negligence upon the part of the defendant appeared as in ordinary actions would entitle

¹ 15 Am. St. Rep. 38.

her to no relief, said: "So far as the divorce awarded to the defendant is concerned, the motion should have been granted under the rule laid down in *McBlain v. McBlain*, 77 Cal. 509. In that case the court, *per* Paterson, J., said: 'The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for a divorce; the policy and the letter of the law concur in guarding against collusion and fraud; and it should be the aim of the court to afford the fullest possible hearing in such matters.' In the present case there seems to have been an honest desire on the part of the plaintiff to present her side of the case; and while in an ordinary action the negligence shown might be sufficient to deprive her of a right to relief, yet, in this kind of a case, a more liberal rule should prevail. And we think that the same reasons require the application of a liberal rule to proceedings for the annulment of marriage, and, therefore, that the judgment should have been set aside as to the whole case."

It is true that in both these cases the matter under consideration was relative to setting aside, upon application, judgments by default, but, as we have said, the same principle of public policy which requires that a full hearing in divorce cases should be had, and that a liberal rule to promote that end, as far at least as the showing is concerned, should obtain, applies in all cases where the application or motion is made within the statutory time upon the statutory grounds.

And while in the cases we have cited the court speaks about the policy of the law being to guard against collusion and fraud, its policy is not limited solely to that end. It is as much public policy that divorces should not be granted, unless for adequate cause, as it is that they should not be obtained by collusion and fraud, because in either event they should not be granted at all, and this politic end can be best promoted and attained in the one, as in the other, by the fullest possible hearing.

In concluding this branch of the case it may be said, as was generally declared in the *Wardsworth* case, that there seems to have been an honest desire on the part of the defendant to be present at the trial and present her side of the case, and that, if we assume that in an ordinary action the showing she made might be deemed insufficient to war-

rant granting her a new trial, yet, in this class of cases, a more liberal rule should prevail, and the order granting her a new trial, as far at least as the objections now under consideration are concerned, should be sustained.

It is further insisted that the order granting the motion for a new trial should be reversed, it being contended that the record shows that respondent received money awarded her by the decree (six hundred dollars), and hence, upon the principle that having taken the benefit of the decree she must bear its burden, she was not entitled to assail the decree on motion for a new trial.

But this money was not received under the decree of divorce, but under a decree of maintenance awarded defendant in 1893. In the decree of divorce the court provided that the plaintiff continue to pay the amount provided for in the maintenance decree up to June 15, 1901, when further payment was to cease. This was the money paid defendant, but it was not under the decree of divorce, but under the decree of maintenance, which, by the terms of the decree of divorce, was not to be effective until June 15, 1901.

The further point is made that the notice of intention to move for a new trial is fatally defective because not signed by the attorney who originally appeared of record for the defendant. While it is true that said notice was signed by a different attorney, still it is apparent that any objection upon that ground was waived by appellant in recognizing and treating the said attorney as representing the defendant on the motion for a new trial, by receiving and admitting service of papers from him in her behalf, without making or reserving any objection on that account at the time, and by serving papers in the appellant's behalf, upon such attorney. Upon this subject it is said in Hayne on New Trial and Appeal (page 59, at close of section 13): "But where the notice is not properly signed, the successful party must reserve his objection on that account at the time it is served upon him, and not treat the notice as sufficient. If he recognizes the attorney giving the notice as the one having authority to give it, he will not afterwards be permitted to question his authority. This is the rule with respect to notices of appeal, and it undoubtedly applies to notices of intention."

These are the only matters upon this appeal requiring attention, and the order appealed from granting a new trial is affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied

[S. F. No. 3102. Department Two.—December 31, 1904.]

FOUR OIL COMPANY, Appellant, v. UNITED OIL PRODUCERS et al., Respondents.

CONTRACTS—LETTERS—PROPOSAL—QUALIFIED ASSENT.—In order to constitute a binding contract by letters there must be a proposal squarely assented to. A qualified acceptance is a rejection of the proposal, and is a new proposal, and if the new proposal is not accepted no contract is constituted.

ID.—SALE OF OIL—ACTION FOR BREACH OF CONTRACT—EVIDENCE—INADMISSIBLE LETTERS.—In an action for breach of an alleged contract to purchase oil, letters containing merely a proposal by plaintiff to sell the oil on specified terms, and a qualified acceptance of the terms by the defendant, adding a material new term, that the proposed quality of the oil must be at a fixed temperature, were properly excluded from evidence.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

W. F. Williamson, Livingston Jenks, and J. A. Elston, for Appellant.

Weil & Lippitt, and James G. Maguire, for Respondents.

HENSHAW, J.—Plaintiff sued defendant corporation and its stockholders, seeking a recovery for alleged breach of contract for the purchase of oil. Upon trial plaintiff sought to prove the contract by the introduction in evidence of the following letters:—

"SAN FRANCISCO, CAL., Dec. 19, 1900.

"UNITED OIL PRODUCERS, PHELAN BLDG.—Gentlemen: We beg to offer you crude petroleum of a guaranteed gravity of not less than 15 at the rate of 2 cars per day, as a minimum, to 3 cars, as a maximum, for one year from February 1st, 1901, to February 1st, 1902, at the price of 52½c. f. o. b., Bakersfield. In case this offer meets with your acceptance and you desire to include January next within the contract, we shall be please to supply you during that month at the same rate and at the same terms. Yours truly,

"FOUR OIL COMPANY,

"CHARLES MUSAUB, Secty."

"SAN FRANCISCO, Dec. 20, 1900.

"NUMBER FOUR OIL COMPANY, MILLS BLDG., CITY.—Gentlemen: Replying to your favor of the 19th inst., would say that we accept your proposition therein contained for fuel oil for one year at 52½ cents, f. o. b., Bakersfield, on 2 cars per day minimum, and 3 cars per day maximum. The gravity of the oil to be 15 degrees Beaume, as you state, but we wish this distinctly understood under this agreement to be 15 degrees Beaume at a temperature of 60 degrees Fahrenheit. We presume that all oil will be of this grade, as it has been thus far, but we do not wish any oil below that gravity at that temperature. Yours truly,

"UNITED OIL PRODUCERS,

"By SHAFER HOWARD, Secretary."

It accompanied its offer with an additional offer to prove the meaning of certain technical terms and abbreviations understood by the parties. The court sustained defendants' objection to the introduction in evidence of the letters, and judgment followed for the defendants, from which plaintiff appeals.

The rules for determining whether or not a proposal and acceptance constitute a binding contract are well settled, and by this court have been expressed in the following language: "To constitute a binding contract made in this form [letters] there must be a proposal squarely assented to. If the acceptance be not unqualified, or go not to the actual thing proposed, then there is no binding contract. (1 Wharton on Contracts, sec. 4.) A proposal to accept, or an acceptance based upon

terms varying from those offered, is a rejection of the offer. (*National Bank v. Hall*, 101 U. S. 43, 51.) An offer imposes no obligation, unless it is accepted upon the terms upon which it was made. (*Tilley v. County of Cook*, 103 U. S. 161.) An acceptance must be absolute and unqualified. A qualified acceptance is a new proposal. (Civ. Code, s.c. 1585.)" (*Wristen v. Bowles*, 82 Cal. 84. See, also, *Yore v. Bankers etc. Assn.*, 88 Cal. 609.) Under these principles of law it is clear that the court's ruling was correct and that the minds of the parties had not met in the creation of a legal obligation, and this for the reason that the acceptance of the defendant was conditional and imported into the contract a term not found in the original proposal and one requiring the assent of the plaintiff before either could be bound. This term is found in the following sentence: "But we wish this distinctly understood under this agreement to be 15 degrees Beaume at a temperature of 60 degrees Fahrenheit." The original proposition contained no limitation upon the temperature at which gravity was to be determined. That the matter of temperature was regarded as of importance is not only shown by the condition expressed in respondent's answer, but is further shown by a copy of another contract made by plaintiff, where it is specified that the gravity shall be determined at a temperature of seventy degrees Fahrenheit. Plaintiff having failed to prove its acceptance of the new condition imposed by defendant's letter, it follows that the acceptance was not absolute and unqualified, but was conditional, amounting to a new proposal upon the part of the defendants, to which the plaintiff never assented. There was thus no completed contract between the parties, and the judgment appealed from is therefore affirmed.

McFarland, J., and Lorigan, J., concurred.

Hearing in Bank denied.

CXLV. Cal.—46

[S. F. No. 2983. Department Two.—December 31, 1904.]

**HIBERNIA SAVINGS AND LOAN SOCIETY, Respondent,
v. P. BOLAND, Administrator of Annie Lennon, De-
ceased, JAMES LENNON, and JAMES BOYER,
Appellants.**

**FORECLOSURE OF MORTGAGE—STATUTE OF LIMITATIONS—DEATH OF ONE
MORTGAGOR.**—The death of one of two mortgagors does not have the
effect to suspend the statute of limitations as to the other mort-
gagor or as to his grantee.

**ID.—BAR APPEARING UPON FACE OF COMPLAINT—DEMURRE—ANSWER—
OBJECTION TO EVIDENCE—ABSENCE OF FINDING.**—Where the bar of
the statute as to the defendants other than the administrator of the
deceased defendant appeared upon the face of the complaint, a
demurre to the complaint on that ground was improperly over-
ruled; and the objection is not cured where the answer set up
the bar of the statute, and such defendants at the trial objected
to evidence of the mortgage on the ground that it was barred as
to them, and there is no finding of fact express or implied to the
contrary.

**ID.—CONSTRUCTION OF FINDINGS—CONCLUSIONS OF LAW—PLEA OF STAT-
UTE NOT DEFEATED.**—Where there was no finding upon the plea
of the statute, nor of facts from which such finding may be inferred,
conclusions of law based upon specific facts found, which were the
only facts put in evidence as to the effect of an unrecorded deed
from the wife to the husband prior to its record, and as to the
deed being subject to the mortgage, and as to the right of fore-
closure against them, cannot defeat the plea of the statute.

APPEAL from a judgment of the Superior Court of the
City and County of San Francisco. James M. Troutt, Judge.

The facts are stated in the opinion.

A. Boyer, for Appellants.

Tobin & Tobin, for Respondent.

SMITH, C.—Appeal of the defendants from a judgment
foreclosing the mortgage to the plaintiff, of the defendant
Lennon and his deceased wife, Annie Lennon,—the defendant
Boland's intestate. The mortgage was made February 21,
1893, to secure the joint and several promissory note of the

mortgagors for the sum of four hundred dollars, with interest, due one year from date; and was recorded the same day. The suit was brought May 16, 1900.

The case as shown by the pleadings and findings is as follows:—

The allegations of the complaint so far as material are, that the note was made and the mortgage executed and recorded as above stated, and that it has not been paid; that the defendants Lennon and Boyer “have interests in or liens upon said real property, but the same whatever they may be are subsequent and subject to the lien of said mortgage”; that the said Annie died intestate on or about March 29, 1893; and that the defendant Boland was appointed her administrator March 1, 1900.

A demurrer was interposed to the complaint by the defendants Lennon and Boyer, on the ground that it appeared on the face of the complaint that the plaintiff’s cause of action was barred by the provisions of section 337 of the Code of Civil Procedure; and there was also a demurrer by the administrator; but both were overruled.

The answer of the defendants Lennon and Boyer alleges, that on or about January 9, 1892 (a little over a year prior to the mortgage), and afterwards until January 27, 1900, the defendant Lennon was the owner of the mortgaged premises under a deed of the former date, recorded January 27, 1900, and that on the latter date he conveyed the same to the defendant Boyer; that neither the defendant Boland nor his intestate in her lifetime ever had any interest in the mortgaged premises since the mortgage was made; and that the plaintiff’s action is barred by the provisions of the above-cited section 337 of the Code of Civil Procedure.

All the allegations of the complaint are found to be true, except the allegation as to the interests of the defendants Lennon and Boyer in the mortgaged land; and with regard to this, and the corresponding allegations of the answer, it is found that at the date of the mortgage the mortgaged property “stood of record in the name of [Mrs.] Lennon”; who by deed of grant, of date January 9, 1892, had conveyed the same to the defendant Lennon; and “that the defendant Lennon acquired said real property by said deed,” and the said Boyer by conveyance from him as alleged in the answer.

There is no finding upon the plea of the statute; nor of facts from which such finding may be inferred. But it is claimed by the respondent that certain of the conclusions of law are to be regarded as findings of fact, and that these are sufficient to defeat the plea. These are: "That the said deed [referring to the deed of Mrs. Lennon to her husband] was void as to the plaintiff up to the time of recording the same"; and, in effect, that the defendants Lennon and Boyer thereby acquired an interest in the mortgaged property "subsequent and inferior to the lien of plaintiff," and "subject" thereto. But, obviously, these propositions are in their nature what they purport to be,—that is, mere conclusions of law based on the specific facts found; which, it appears from the bill of exceptions, where the only facts put in evidence.

A personal judgment was entered against the defendant Boland as administrator for the amount due on the note; and a judgment of foreclosure against the defendants generally.

It is admitted that, under the provisions of section 353 of the Code of Civil Procedure, the plaintiff's cause of action is not barred as to the defendant administrator. But the contrary is claimed as to the defendants Lennon and Boyer; and whether this contention can be sustained is the only question involved in this appeal. It will be considered, first, as presented by the demurrer to the complaint, and afterwards as affected by the subsequent proceedings.

As to the former aspect of the question, it appears on the face of the complaint that the suit was brought more than six years after the note and mortgage became due; and nothing appears in the complaint to rebut the defense of the statute, unless it be the bare fact of the death of Mrs. Lennon before the note was barred. But this, it is clear upon principle, could not affect the bar of the statute as to the surviving mortgagor; and it has been so held. (*Vandall v. Teague*, 142 Cal. 471; *Sichel v. Carillo*, 42 Cal. 493.) On the facts alleged, therefore, all that the plaintiff was entitled to was a judgment against the administrator of Mrs. Lennon only, and such as "in no wise to prejudice the title of" her co-mortgagor. (*Vandall v. Teague*, 142 Cal. 493.) This decision does not conflict with the decision in *Estate of Bullard*, 116 Cal. 355, cited by the respondent's counsel.

Nor was the error in overruling the demurrer cured by the subsequent proceedings. The plaintiff was, perhaps, entitled to controvert the affirmative defense set up in the answer, and, without pleading, to prove any facts tending to rebut it (Code Civ. Proc., sec. 462, and cases cited, Pomeroy's ed.), and a finding in its favor on sufficient evidence upon the issue of the statute would have been sufficient to support the judgment. But, as appears from the bill of exceptions, the only evidence offered by the plaintiff—except as to non-payment—was the note and mortgage, which were admitted over the objection that it appeared on their face that they were barred by the statute as pleaded. On the evidence, therefore, as well as on the complaint, the plaintiff's cause of action appears to be barred, and there is no finding, express or implied, to the contrary.

We advise that the judgment appealed from be reversed.

Harrison, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is reversed.

McFarland, J., Lorigan, J., Henshaw, J.

[S. F. No. 3801. In Bank.—December 31, 1904.]

PAUL J. DENNINGER, Petitioner, v. RECORDER'S COURT OF CITY OF POMONA, Respondent.

MUNICIPAL CORPORATIONS—ORDINANCE REGULATING GAS-RATES—MISDEMEANOR—CONSTITUTIONAL LAW—MUNICIPAL CORPORATION ACT.—A municipal ordinance passed by a municipal corporation of the fifth class, regulating gas-rates and establishing a maximum rate, and declaring it a misdemeanor to collect or receive more, is constitutional and valid. If it is not authorized by the grant of police power made in section 11 of article XI of the constitution, it is authorized by section 19 of article XI of the constitution, empowering municipal corporations to fix gas-rates for persons or companies laying pipes therein, construed in connection with the Municipal Incorporation Act, providing for ordinances and empowering cities of the fifth class to impose fines, penalties, and forfeitures for the violation of ordinances.

ID.—CONSTRUCTION OF CONSTITUTION—MANDATE UPON LEGISLATURE.—

Whatever may be the interpretation of section 33 of article IV of the constitution, laying a mandate upon the legislature to regulate charges for services performed and commodities furnished by telegraph and gas corporations, the failure of the legislature to act under that section will not render nugatory the right granted by section 19 of article XI thereof to municipal corporations, re-enforced by a prescribed method for its exercise, and by so much legislation as is absolutely necessary to supply its deficiencies.

ID.—PUNISHMENT FOR MISDEMEANOR—POWER OF LEGISLATURE—REASON-

ABLE FINE.—Whatever the legislature may punish as a misdemeanor it may authorize a municipal corporation to punish as a misdemeanor. A fine of three hundred dollars for violation of an ordinance fixing a maximum rate for gas is not unreasonable.

ID.—COLLECTION FOR CORPORATION—OPERATION OF ORDINANCE.—

Where the ordinance by its terms applies to any person who collects or receives more than the maximum rate for gas, the fact that the defendant convicted of misdemeanor was collecting as agent for a corporation cannot render the complaint for misdemeanor insufficient. The corporation must act through the agency of natural persons, to whom the ordinance applies.

ID.—WRIT OF REVIEW—JURISDICTION OF RECORDER'S COURT.—

If a complaint under a municipal ordinance should fail to allege facts constituting one of the offenses to which the jurisdiction of the recorder's court is confined, a judgment of conviction may be reviewed and annulled upon *certiorari*; but where it appears that it has jurisdiction over the offense charged, its judgment must be affirmed.

CERTIORARI to review a judgment of the Recorder's Court of the City of Pomona. John H. Lee, Recorder.

The facts are stated in the opinion of the court.

Herbert Cutler Brown, and Garret W. McEnerney, for Petitioner.

Robert G. Loucks, City Attorney, for Respondent.

BEATTY, C. J.—The petitioner was convicted in the recorder's court of collecting from a resident of Pomona more than one dollar and fifty cents per thousand feet for gas, contrary to the provisions of a municipal ordinance establishing that as the maximum rate, and declaring it a misdemeanor to collect or receive more. He seeks in this proceeding, by *certiorari*, a review of the judgment of fine

and imprisonment, and the sole question to be determined is whether the recorder's court exceeded its jurisdiction.

Pomona is a city of the fifth class, and the recorder's court in cities of that class has a jurisdiction in criminal cases strictly limited in character (Stats. 1883, p. 265), so that if the complaint upon which a defendant is arrested and tried fails to allege facts constituting one of the offenses to which its jurisdiction is confined, a judgment of conviction may be reviewed and annulled upon *certiorari*, or, in case of actual imprisonment, upon *habeas corpus*.

The petitioner contends that the complaint upon which he was arrested and tried charges no offense,—first, because the municipality has no power to limit gas-rates by ordinance; and second, because even if it has the power to establish a maximum rate it has no power to make the violation of such an ordinance a misdemeanor, punishable by fine or imprisonment. Upon these two propositions the argument has taken a very wide range, but to them it has been confined. Whatever question may have arisen at any stage of the proceedings as to the sufficiency of the complaint to state a case within the penal clauses of the ordinance, no such question has been raised here, and we shall therefore confine ourselves to a consideration of the two propositions above stated.

Regarding both propositions, it is contended by the respondent that in the absence of any other statutory or constitutional grant of power every provision of the ordinance is fully supported by section 11 of article XI of the constitution, which reads as follows: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." By this section the people have made a direct constitutional grant of the police power of the state to every municipal corporation for local purposes. It is conceded by the petitioner that the general grant of legislative power in the constitution of a state includes the power to regulate gas-rates by statute, and that this power may be delegated by statute to municipal corporations. If this is so, and if the regulation of gas-rates by the state is an exercise of the police power, it would be difficult to say why, in the absence of more specific provisions in our constitution relating to this matter, the municipal corporations of the state could

not by virtue of the section above quoted adopt and enforce within their local limits ordinances as comprehensive, both as to the establishment of rates and the infliction of penalties, as the statutes which the legislature is competent to enact for the state at large.

But these are questions which we do not find it necessary to decide. The constitution contains specific provisions relating to the matter of limiting the charges for gas furnished to cities and their inhabitants, provisions which in and by themselves furnish a complete answer to the petitioner's first proposition, and in connection with others an equally satisfactory answer to the second.

By section 19 of article XI of the constitution it is provided: "In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

This section very clearly gives to every municipal corporation the *right* to regulate the charges of any person or corporation supplying gas to a city or its inhabitants through pipes laid in the public streets, and in the absence of any other provision relating to the matter would be held to imply the power to exercise the right by the same methods by which its legislative power is exercised generally, so that nothing would be required to make the section completely operative beyond a law for the organization of municipal corporations and prescribing a mode of exercising their legislative power. In other words, a right to regulate coupled with a lawful method of exercising the right is all that is requisite to give validity

to a regulation, and here we have the right conferred by the constitution, and a mode prescribed by the legislature for its exercise. That is to say, cities may be organized—as the city of Pomona has been organized—under the General Municipal Corporation Act, by which they are empowered to pass ordinances. In cities of the fifth class they are provided with a board of trustees who are empowered to pass ordinances not in conflict with the constitution, or the laws of this state or of the United States, and the forms to be observed in the passage of ordinances are definitely prescribed. (Stats. 1883, p. 250.)

This would seem to be conclusive as to the validity of that part of the ordinance establishing the maximum rate, and it would be entirely so if it were not for the fact that section 33 of article IV of the constitution provides as follows: "The legislature shall pass laws for the regulation and limitation of the charges for services performed and commodities furnished by telegraph and gas corporations, and the charges by corporations or individuals for storage and wharfage, in which there is a public use; and where laws shall provide for the selection of any person or officer to regulate and limit such rates, no such person or officer shall be selected by any corporation or individual interested in the business to be regulated, and no person shall be selected who is an officer or stockholder in any such corporation."

It is contended that this section would be rendered entirely inoperative and meaningless if section 19 of article XI should be held to be self-executing—that the framers of the constitution having enjoined upon the legislature the duty of passing laws for the regulation and limitation of gas-rates, no valid ordinance can be passed under section 19 of article XI until the legislature has first obeyed the mandate which required it to regulate the mode of regulation. In answer to this it may be said that we have not held that said section is in itself absolutely self-executing. It merely conferred or secured a right without the power of exercising or enforcing it, outside of those municipal corporations then in existence, and armed with powers similar to those which Pomona and all cities of the fifth class have since acquired by organizing under the general municipal corporation act. But for the fact that the enactment of this law was specifically enjoined by section

6 of article XI, it might perhaps have been deemed a compliance with the mandate of section 33 of article IV. Evidently, however, if that section is to have any operation, it must be construed in some other sense. What exactly it does mean it is difficult to say. It may mean, as held by Judge Wilbur of the superior court, that the legislature was to pass a law for the organization of some board or commission to fix gas-rates for rural districts not incorporated but supplied with gas; and the wording of the last part of the section gives countenance to this view. Or it may mean that the legislature must enact laws making it compulsory upon the governing bodies of our municipal corporations to establish rates at frequent intervals, and prescribing penalties for failure to do so, as the constitution has itself done in regard to persons supplying water. Certainly if the legislature had passed a law of either character here suggested there would have been no ground upon which this court could have held that something more was requisite to carry out the purpose of the constitution. Petitioner's claim is, that the purpose of this section was the protection of persons supplying gas and other commodities by leaving section 19 of article XI inoperative as to the fixing of gas-rates until the legislature had enacted a code of procedure for the city councils providing, among other things, for notice and hearing and prescribing the period during which a rate once fixed should endure. But all this is purely conjectural. We do not know, and can hardly surmise, what the precise purpose of section 33 of article IV was. We can be very certain, however, of one thing that was not its purpose. Without bringing it in direct and irreconcilable conflict with section 19 of article XI it cannot be held to have required or authorized the regulation of gas-rates in any incorporated city to be taken away from the governing body of such city and given over to any person, board, or officer, to be selected outside of such governing body. And yet it does contemplate (in its last clause) the enactment of laws under which some person or officer is to be chosen (specially) to fix rates. This, as above stated, tends very strongly to sustain the view of Judge Wilbur, that the laws contemplated and enjoined by said section 33 are laws applicable solely to districts outside of incorporated cities, and if so the failure to enact such laws—due no doubt to the

absence of any actual occasion for applying them—can have no effect upon the operation of a provision of the constitution relating exclusively to municipal corporations.

But waiving this view, and assuming that the intention of section 33 of article IV was to lay a mandate upon the legislature to enact such laws as might be deemed necessary to secure fairness in fixing, and reasonable permanence in maintaining rates when fixed, it cannot be denied that the whole matter was committed to the discretion of the legislature as to the time for action and the scope of action. It was assumed that when action was called for the legislature would act, and that all safeguards found to be necessary would be provided, the municipalities being subject in the mean time to supervision and restraint by the courts if they should attempt anything in the nature of confiscation. What the framers of the constitution assumed in committing this matter to the discretion of the legislature the courts are justified in assuming. When further regulation is needed it will be provided, but in the mean time the failure of the legislature to act will not render nugatory a right granted by the constitution and re-enforced by a prescribed method for its exercise. The right and the power to regulate being conjoined, the duty to impose limits or conditions to the exercise of the right—supposing it to rest upon the legislature—so long as it remains unperformed, simply leaves the right unhampered except so far as it may be restricted or qualified by the general principles or specific provisions of our fundamental law.

The doctrine of this court is, that all constitutional provisions are self-executing when they can be given reasonable effect without the aid of legislation, unless it clearly appears that such was not the intention (*Winchester v. Howard*, 136 Cal. 440¹), and a necessary corollary to this proposition is, that a constitutional provision not strictly self-executing becomes operative just as soon as it is supplemented by so much legislation as is absolutely necessary to supply its deficiencies; which is the case here.

As to the right of all persons to lay gas-pipes in the streets of incorporated cities, subject only to its express conditions, section 19 of article XI has been held to be self-executing (*In re Johnson*, 137 Cal. 115), and to hold that the correlative

¹ 89 Am. St. Rep. 153.

right of the municipalities to fix rates must remain in abeyance until the legislature passes some law in obedience to the supposed mandate of section 33 of article IV of the constitution might forever deprive the municipalities of the state of a protection which the constitution clearly designed to afford. For the legislature as to this matter cannot take the place of the municipal bodies. It cannot regulate the charges for gas within municipal boundaries, though, according to the claim of petitioner, it can by merely ignoring the supposed mandate of the constitution tie the hands of those upon whom the constitution has conferred the right. We find nothing in the decisions of this court which leads to such a conclusion, and if in the long array of cases cited by counsel from other jurisdictions there may be found reasoning tending to support their contention we do not feel constrained to follow it. We hold, on the contrary, that the two rights—the right to supply gas to cities, and the right to fix rates—go hand in hand. Each exists by force of the constitution, and each becomes effective upon the organization of a municipal government. If it be argued that the right to fix rates may be abused in the absence of restraining legislation, it may be answered that so also may the right to dig up and obstruct streets for the purpose of laying pipes be abused, but for any transgression of this sort the courts may be supposed to afford a sufficient remedy. In this instance we see nothing savoring of abuse in the provisions of the ordinance establishing the maximum rate. It was passed in March, 1903, was to take effect on the first of July following, and the rate was to stand for one year.

Petitioner's second proposition requires less extended discussion. Subdivision 16 of section 764 of the Municipal Corporation Act empowers the board of trustees in cities of the fifth class to impose fines, penalties, and forfeitures for any and all violations of ordinances, etc. (Stats. 1883, p. 254.) The ordinance in question, so far as it fixes the rate, is a valid ordinance, adopted not in pursuance of merely implied power, but in the exercise of a right specially secured by the constitution, and unless the law empowering the city to punish its violation as a misdemeanor is unconstitutional, or is inapplicable to an ordinance of this character, the penal clauses are also valid. We know of no ground upon which this law

can be held unconstitutional. The legislature has made it a misdemeanor to ask or receive more than the sum allowed by law for the carriage of freight or passengers by rail. (Pen. Code, sec. 525.) An overcharge for gas cannot be distinguished in principle from an overcharge for a railway fare, and therefore it cannot be said that the penal clauses of this ordinance are in conflict with the policy of the state, as was said in *Ex parte Ah You*, 88 Cal. 99.¹ In that case an ordinance was held unreasonable and invalid because it authorized a fine of one thousand dollars for an offense, when the statute of the state limited the punishment of grosser offenses of the same category to a fine of five hundred dollars. No such objection can be urged against this ordinance, which limits the penalty to three hundred dollars. Besides the case last cited, we are referred to a number of decisions of this court where municipal ordinances not passed in pursuance of expressly delegated power have been held invalid because unreasonable. (*Ex parte Hodges*, 87 Cal. 162; *Ex parte Whitwell*, 98 Cal. 73, etc.²) These cases, involving not the right to punish an infraction of the ordinance, but the right to enact its substantive provisions, manifestly have no application to an ordinance the substantive provisions of which are held valid.

The question whether the legislature can delegate to a municipal corporation the power to determine what shall constitute a criminal offense was considered by this court in *Ex parte Guerrero*, 69 Cal., at page 95. The decision of the point was perhaps not necessary in that case where the validity of the ordinance in question might have been rested wholly upon the direct grant of the police power contained in section 11 of article XI, but the court sustained the ordinance on both grounds, citing with approval a Connecticut case where the only authority of the municipality was that conferred by its charter. Not only that case but many cases decided in other jurisdictions, as well as the text of Dillon and other commentators on the law of municipal corporations, sustain the doctrine that whatever the legislature may punish as a misdemeanor it may authorize a municipal corporation to punish as a misdemeanor. In this state, as we have seen, there is a law making the receipt of illegal railway fares or

¹ 22 Am. St. Rep. 230.² 35 Am. St. Rep. 152.

freights a misdemeanor—an act no more to be characterized as *malum in se* than the exaction of an excessive charge for gas. The constitutionality of this law, it is true, has never been passed upon, but no reason for holding it unconstitutional has been suggested, and none occurs to us. It would seem, indeed, that the exaction of excessive rates in a business charged with a public use is an offense of the same essential quality as extortion by public officers (Pen. Code, sec. 70), an offense clearly within the police power of the state. The ordinance, we conclude, is in no respect invalid.

There is an objection—not distinctly made, but suggested—to the sufficiency of the complaint upon which the petitioner was tried. It shows that he collected and received the excessive rate, not for himself, but for the corporation holding the franchise. But a corporation must act through the agency of natural persons, and the ordinance by its express terms applies to any person who collects or receives.

The judgment of the recorder's court is affirmed.

McFarland, J., Angellotti, J., Shaw, J., Van Dyke, J., Lorigan, J., and Henshaw, J., concurred.

[S. F. Nos. 3860, 3861. In Bank.—December 31, 1904.]

**PAUL J. DENNINGER, Petitioner, v. RECORDER'S
COURT OF CITY OF POMONA, Respondent.**

**MUNICIPAL CORPORATION—POWER TO REGULATE GAS-RATE—VALIDITY OF
ORDINANCE—CONSTITUTIONAL LAW.**—A municipal ordinance in a county of the fifth class fixing a maximum rate for gas, and providing a punishment for violation of the same, is valid under section 19 of article XI of the constitution, construed in connection with the Municipal Corporation Act.

Id.—CERTIORARI—GAS FOR COOKING, HEATING, AND ILLUMINATING PURPOSES—CONVICTION—JURISDICTION OF RECORDER'S COURT.—A writ of *certiorari* will not lie to review and annul a conviction under such ordinance under a complaint charging the defendant with collecting and receiving a greater rate than the maximum rate allowed by the ordinance for gas furnished in the pipes laid in the streets for cooking, heating, and illuminating purposes. It is

sufficient that the complaint charged a public offense, for collecting and receiving an excessive rate for illuminating purposes, within the jurisdiction of the recorder's court.

Re.—RIGHT OF CITY UNAFFECTED BY USE.—The right of the city to fix the rate for gas is unaffected by the use which is made of it. It covers all gas furnished through pipes laid in the street. [*Per Beatty, C. J., and Van Dyke, J.; the majority of the court expressing no opinion.*]

Re.—CONSTRUCTION OF CONSTITUTION.—Section 19 of article XI of the constitution does not specifically include gas for heating or cooking; but under section 11 of article XI of the constitution the city has the proper public authority to make the regulations here in question. [*Per Shaw, J.*]

CERTIORARI to review judgment of the Recorder's Court of the city of Pomona. John H. Lee, Recorder.

BEATTY, C. J.—These cases are in all respects like the case of the same title (S. F. No. 3801, *ante*, p. 629), just decided, except that in one of them the petitioner is charged with collecting the excessive rate for gas furnished for *cooking, heating, and illuminating* purposes.

Section 19 of article XI does not directly confer upon any individual or company the right to lay pipes and conduits in the streets of a city in order to supply gas for cooking and heating purposes, but only so far as may be necessary for supplying the city and its inhabitants with gaslight. The same gas, however, which furnishes light also serves for cooking and heating, and the pipes and connections necessary for the one purpose make the gas available for the other purposes without subjecting the streets to any additional burden. It was accordingly held in *Ex parte Johnston*, 137 Cal. 122, that an intention to permit the use of gas for other than illuminating purposes afforded no ground for prohibiting the laying of the pipes by a party claiming the benefit of the constitutional grant.

For the same reasons it must be held that the right of the city to fix the rate for gas is unaffected by the use which is made of it. It covers all gas furnished through the pipes laid in the street.

The judgments are affirmed.

Van Dyke, J., concurred.

ANGELLOTTI, J., concurring.—I concur in the judgments. The determination of the question as to whether the municipality had the right to fix a rate for gas furnished for cooking and heating purposes is not necessary to a decision of either case, and I therefore express no opinion thereon. The complaint against petitioner in the recorder's court charged him with charging, collecting and receiving the excessive rate for gas furnished to one Witman, not only for cooking and heating purposes, but also for illuminating purposes.

As it thus charged the collecting and receiving of the excessive rate for gas furnished for illuminating purposes, it charged a public offense, within the jurisdiction of the recorder's court. (*Denninger v. Recorder's Court*, ante, p. 629.) It cannot, therefore, be held that the recorder's court has exceeded its jurisdiction, and this proceeding must fail.

McFarland, J., Henshaw, J., and Lorigan, J., concurred.

SHAW, J., concurring.—I concur in the judgments. I do not think it necessary to resort to a somewhat difficult construction of section 19 of article XI of the constitution in order to give to a municipality the power to regulate the charges of a corporation or natural person in charge of works devoted to the public use of supplying inhabitants thereof with gas solely for heating, which includes cooking. That section applies only to water and light, and does not specifically include any materials used for heating alone. The power of a municipality in such cases comes from the general grant of authority to make such local, police, and other regulations as are not in conflict with general laws found in section 11 of article XI of the constitution, in connection with the general power to pass ordinances given by section 764 of the Municipal Corporation Act. Every corporation or person who, by reason of privileges received from the state, such as the right to use the highways, or the right to exercise the power of eminent domain, is in the business of supplying the general public with any commodity or service necessary or convenient for the general comfort and welfare is subject to the dominion and supervision of public authority, so far as may be necessary to prevent such business from being car-

ried on unjustly or oppressively by the imposition of excessive charges for such commodity or services. This dominion is exercised for the general good, and it is one form of what is known as the police power. (1 Tiedeman on State Control, secs. 96, 97; Cooley on Constitutional Limitations, 7th ed., 870, *Munn v. Illinois*, 94 U. S. 125; *Budd v. New York*, 143 U. S. 517; *People v. Budd*, 117 N. Y. 1; *Brass v. North Dakota*, 153 U. S. 391.) There was much dissension among the judges of the United States Supreme Court upon the question how far private business affected with a public use, but not the recipient of any privileges from the state, such as warehouses, could be interfered with in the exercise of this power, but all were agreed as to the nature and character of the power itself. Nor can there be any serious question that the business of supplying gas to the inhabitants of a city is subject to such regulation by the proper public authority in charge of this power. In this case, by virtue of the constitutional grant, the city of Pomona has the exercise of the power for all purposes local to the city, and was the proper public authority to make the regulations here in question.

[S. F. No. 2968. Department Two.—January 3, 1905.]

ABNER DOBLE COMPANY, Appellant, v. M. J. McDONALD, Respondent.

ACTION FOR MINING MACHINERY AND WORK—ISSUES—COUNTERCLAIM—CONFLICTING EVIDENCE—PROBABILITIES—SUPPORT OF FINDINGS.—In an action to recover a balance of account for mining machinery alleged to have been sold and delivered to the defendant, and for work in installing the same upon a mining claim owned by a corporation in which plaintiff was a stockholder, where issue was joined upon the complaint, and the defendant by answer and cross-complaint pleaded a counterclaim for money paid to plaintiff's use, and the evidence was squarely conflicting between the parties, without other witnesses, and the probabilities were in favor of the defendant, findings against the plaintiff, and in favor of the counterclaim of the defendant, were sufficiently supported and will not be disturbed upon appeal.

ID.—CROSS-COMPLAINT—FAILURE TO ALLEGE NON-PAYMENT OF COUNTERCLAIM—CURE OF DEFECT.—The failure of the cross-complaint to

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allege non-payment of the counterclaim pleaded therein was cured by answer thereto denying the original indebtedness, by failure to object to evidence thereof for such failure, and by findings in support of the counterclaim.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William R. Daingerfield, Judge.

The facts are stated in the opinion.

Frohman & Jacobs, for Appellant.

Edward Lyneh, for Respondent.

SMITH, C.—The plaintiff sues to recover the sum of \$7,269.75, as balance due on an account for goods sold and delivered to the defendant, and for work and labor done for him at his request. The allegations of the complaint are denied; and a counterclaim is set up by the defendant, by answer and cross-complaint, for the sum of \$383.60 paid by the defendant to the use of the plaintiff at its request. The goods in question consisted of mining machinery; and the work and labor counted on by the plaintiff was done in installing the same in the Gover Mine, the property of the Gover Mining Company. The money expended by the defendant was expended in the installment of the same machinery. The findings were for the defendant on all the issues, and judgment was entered in his favor for the sum demanded in the cross-complaint, with costs. The appeal is by the plaintiff from the judgment and from an order denying its motion for a new trial. The questions involved are as to the sufficiency of the evidence to justify the findings of the court.

At the time of the transactions in question the Gover Mining Company was heavily indebted, and without assets except the mine; and this had been attached, and was in imminent danger of being ruined for lack of funds to keep it free of water. The plaintiff was heavily interested in the company as a stockholder and creditor, and was also its surety for an indebtedness of fifteen thousand dollars (secured by mortgage on the mine), and for other indebtedness, to the Anglo-Californian Bank. It was represented in the management of the

mine by two of its own managers, Robert and William Doble, who were directors of the mining company, and with its president, Emery, appear to have had the management and control of it.

Under these circumstances, in the early part of September, 1894, the defendant, McDonald,—who prior to the transactions in question had no interest in the mine—was applied to by Emery and Robert Doble—as the former says—“to take hold of the mine” and to “keep [it] clear of water so that we could sell it”; for which purpose it was proposed to put the mine “in his hands to sell.” Robert Doble’s account of the matter is somewhat different. It is, in effect, that he proposed to McDonald to purchase the bank mortgage, and to acquire the mine by foreclosure; and he assured him that the plaintiff would not spend any more money on the mine. The implication seems to be that the plaintiff abandoned its interest in the mine to McDonald; but the evidence does not go to this extent. The last conversation between this witness and McDonald took place on September 7th or 8th, and on the 13th William Doble approached McDonald on the same subject, referring to the previous interview between Robert and McDonald; but the latter “had not arrived at a definite conclusion.” But on the next day, the 14th, the witness says McDonald told him “that he had considered the matter favorably, and had decided to take up the Gover matter, and requested [the witness] to send a telegram to [his] brother Robert”; which was done accordingly—the telegram being written or dictated by McDonald. The witness adds: “Before I went, McDonald had stated that he had decided to take up the Gover proposition, and I completed my mission when I sent the telegram which he requested,” etc. The telegram alluded to—which is of date September 14, 1894, and addressed to Robert Doble—and signed by William—is as follows: “McDonald has authorized Hale to keep water out of Gover under your directions.” Hale was the superintendent of another mine for McDonald, and was instructed by telegram of same date: “Take charge under Robert Doble of Gover Mine. Keep water out at my expense. Will write.” At the same time McDonald wrote him: “I have wired you this P. M. to take charge of Gover under Doble, to keep water out. Bank will not do it, and they will get into more trouble

if the mine fills with water, so I will do it for a while until something is agreed upon. I really don't know if the mine is worth anything or not. You don't want to promise to deliver wood to the Gover, unless you are sure what they will do for paying for it. . . . Yours truly. That Gover has broke everybody that has fooled with it yet, so I want to be careful."

It was under these circumstances that McDonald took hold of the mine; and it is clear that up to and including this date all that he had undertaken had been to keep the water out of the mine, and that there was no obligation on his part to do this any longer than he should choose. But according to the testimony of William Doble, there was another interview between him and McDonald on the 17th of September, on which occasion Doble says he was instructed by McDonald to purchase the machinery in question and have the same put up at the mine for and on account of the latter; and this, the witness says, was done accordingly. But it is denied by McDonald that he gave such an order, or that it was understood or agreed that the machinery was to be purchased or put up on his account, or that he was in any way interested in the purchase; and there were no witnesses as to what passed between the parties other than themselves.

Under the circumstances of the case, the plaintiff's account of the matter presents some points of difficulty that require explanation. McDonald, according to his own account, was willing, for reasons stated, to go to some expense to assist Emery and the plaintiff, and it is not improbable that he anticipated making some profit in the future from his expenditures. But he did not have, nor did he acquire, any interest in the mine. Nor did he seek to acquire any, unless his attempt to purchase the mortgage to the bank can be so regarded; and had the proposed purchase entered seriously into his calculations, it would seem that before investing so largely, as it is claimed he did, he would at least have taken an option on the mortgage, or otherwise secured himself. This could easily have been effected; and without this, and in the absence of any contract with the mining company or the plaintiff securing him an interest, there is an intrinsic improbability in the theory that he would have been willing to make so heavy a purchase on the mere chance of purchasing the claim against the mine. This it was equally open to any one to purchase; and the plain-

tiff itself, as the surety of the mining company, had the option to acquire it by mere payment. Whatever advantage, therefore, there was in the privilege of acquiring the claim was peculiarly the plaintiff's; and without an option from it, or from the bank, the defendant's chance of acquiring it was dependent entirely upon the plaintiff's future consent. On the other hand, there is no improbability in the supposition that the plaintiff should be willing to go to the expense of the machinery in order to save its large investment; and it is to be noted in this connection that it retained all its rights in the mine intact. The transaction, as detailed by William Doble, was therefore simply that McDonald consented to expend upon the property of the mining company—in addition to about four thousand dollars, expended under the original understanding—the further sum of over seven thousand five hundred dollars, without acquiring any interest in or security upon the property, and without any motive that could be reasonably ascribed to a man of average intelligence.

The court below was therefore justified in finding for the defendant on the main issues, and also on the cross-complaint; and indeed it would have been justified in doing so, even if the probabilities of the case had been more equally balanced. Other points made by appellant relate to matters not affecting the result. The failure of the defendant to allege in his cross-complaint that the amount demanded had not been paid, was cured by the plaintiff's answer, which denies the original indebtedness; and also by the failure to object to the evidence on this ground at the trial and by the findings. We see no material error in the record.

We advise that the judgment and order appealed from be affirmed.

Chipman, C., and Harrison, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Lorigan, J., Henshaw, J.

Hearing in Bank denied.

[S. F. No. 8653. Department Two.—January 3, 1905.]

In the Matter of the Estate of THOMAS BELL, Deceased.
TERESA BELL, Special Administratrix, Appellant, v.
LOUISA J. THOMPSON, as Trustee, etc., et al., Creditors of Estate, Respondents.

ESTATES OF DECEASED PERSONS—ACCOUNT OF SPECIAL ADMINISTRATRIX—COMMISSIONS PAID REAL ESTATE AGENT—UNAUTHORIZED EXPENDITURES—BENEFIT OF ESTATE.—The court in settling the account of a special administratrix properly disallowed expenses incurred in employing real-estate agents to sell the property of another estate, from the sale of which the estate was benefited by the payment in full of a claim in favor of the deceased against such other estate. The fact that the expenditure was made in good faith, and for the benefit and preservation of the estate, cannot justify an expenditure not authorized by law.

ID.—CONSTRUCTION OF CODE—EXPENSES INCURRED IN PERFORMANCE OF TRUST FOR BENEFIT OF ESTATE.—The repayment out of trust property for expenses incurred in the performance of the trust for the actual benefit of the estate, provided for in section 2273 of the Civil Code, has no application to executors, administrators, or guardians, who are excluded from the provisions of the chapter concerning express trusts by the terms of section 2250 of that code.

ID.—SALE OF MINING STOCK—EXPENSES FOR EXAMINATION AND REPORT UPON MINE.—A special administratrix has no power as such to sell mining stock, and expenses incurred by her in the employment of an expert to examine and report upon the condition of the mine were properly rejected, and cannot be justified as an effort to determine the value of stock held by another estate against which a claim was held by the estate of which she was special administratrix.

ID.—EXPENSES PAID DETECTIVE AGENCY—WATCHING OFFICE OF REMOVED EXECUTORS.—An item in the account for expenses paid to a detective agency for watching the office of former executors, who had been removed, on the ground that the special administratrix believed them to be criminals, cannot be said to have been improperly rejected where it is not shown that either of them ever endeavored to conceal or make away with any of the papers belonging to the estate, but it appeared that they had given up all of the papers called for.

ID.—EXPENSES OF REMOVING EXECUTOR.—Items in the account of the special administratrix for costs and expenses incurred in the removal of an executor, prosecuted by her as widow and heir of the deceased, and as a creditor of his estate, were properly rejected.

It matters not that the proceeding was beneficial to the estate. The attorneys' fees, costs, and expenses are chargeable, not to the estate, but solely to the heir or creditor who prosecutes the proceeding.

ID.—EXPENSE FOR ENGBOSSING BILL OF EXCEPTIONS—DUTY OF ATTORNEY.—It is the legal duty of the attorney employed by the special administratrix to defend a litigation to engross a bill of exceptions in the case, and an item for expense paid to a clerk in his office for engrossing the bill cannot be allowed in the account of the special administratrix.

ID.—ITEMS OF CREDIT GROWING OUT OF DISALLOWANCE—MODIFICATION OF SETTLED ACCOUNT—COSTS.—Items of credit to which the special administratrix was entitled in connection with the disallowance of moneys paid to real-estate agents and to a mining expert, and which the court below would have corrected upon proper application, will be allowed as a modification of the settled account, without costs.

APPEAL from an order of the Superior Court of the City and County of San Francisco settling the final account of a special administratrix. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

T. Z. Blakeman, for Appellant.

Drown, Leicester & Drown, for Respondents.

HIENSHAW, J.—This is an appeal by the special administratrix from the order of court settling her final account as special administratrix and refusing to allow certain expenditures charged therein.

1. The court refused to allow certain items charged as expenditures in the matter of the collection of the claims of the Bell estate from the estate of Robinson. The circumstances briefly were these: L. L. Robinson had executed his promissory note to Thomas Bell in his lifetime for the sum of twenty-nine thousand dollars. This note Bell had deposited with the Bank of California as security for debts owing by him. The Bell estate had a separate claim against the Robinson estate for \$1,287. Upon both of these claims there was accumulated interest. The Robinson note having been given to the Bank of California as security for the debt of Bell, it is apparent

that it was to the interest of the estate of Bell to realize as much as possible upon that note, since for any deficiency the estate of Bell was responsible over to the bank. The principal asset of the estate of Robinson was the Los Medanos Rancho, in Contra Costa County, which was heavily encumbered by mortgage. It was important to secure a purchaser who would pay such price for the ranch as to leave sufficient funds over for the liquidation of the claims of the Bank of California and of the estate of Bell. Mr. Blakeman, the attorney for the special administratrix herein, had himself substituted as attorney for the Bank of California and as its attorney undertook the collection of the claims. The result was, that the rancho was sold for money enough to pay the claims of the bank and of the Bell estate in full. Mr. Blakeman testified that he proceeded to sell the Robinson rancho just the same as an owner would do, and for that purpose had to and did employ real-estate agents and agents to get special information, to search out prospective purchasers, to make maps and the like. The payments for these purposes are the ones which the court refused to allow in settling this account. The court found, it should be added, that the special administratrix in incurring the expenditures and in paying these sums acted in good faith and in accordance with what she believed to be the best interests of the estate of Bell, and believed the expenses to be necessary expenses in connection with her proceedings to collect and preserve the assets of the estate of Bell and to collect the claims of the estate of Bell against the estate of Robinson. Notwithstanding the benefits which accrued to the estate of Bell, the court properly refused to allow these expenditures. They were not lawful expenditures for the special administratrix to make, and the court in probate well summed up the matter when it said: "The special administratrix of the estate of Bell had no authority derivable from the statutes of this state to engage in contracts with real-estate or other agents for the payment from the funds in her charge of commissions on sales made of property belonging to the estate of Robinson." The matter of these expenditures is rigidly and properly governed by the express language of the codes, and to say in this or in any case that an expenditure not authorized by the law as necessary for the preservation of the estate, could be allowed be-

cause made in good faith, or because benefit resulted to the estate from it, would be not only to subvert the law, but it would substitute for the wise rule which the law has laid down the judgment, caprice, or whim of the court in probate.

Nor can these claims be countenanced and allowed, as appellant seeks to have them, under section 2273 of the Civil Code. That section provides that "A trustee is entitled to the repayment, out of the trust property, of all expenses actually and properly incurred by him in the performance of his trust. He is entitled to the repayment of even unlawful expenditures, if they were productive of actual benefit to the estate." This, it is true, is the express rule of law made applicable to trustees generally, but the foundation of appellant's argument—namely, that a special administratrix, being a trustee, comes within the provisions of the section—is completely overthrown by section 2250 of the Civil Code, which, being a part of the same chapter as the section above quoted, declares: "The provisions of this chapter apply only to express trusts, created for the benefit of another than the trustor, and in which the title to the trust property is vested in the trustee; not including, however, those of executors, administrators, and guardians, as such." We have not considered it necessary to discuss separately each of the items growing out of the transactions of the Robinson estate which the court rejected. From what has been said it is plain that one and all they were properly disallowed.

2. The estate of Thomas Bell owned shares of stock in the North Bloomfield Mine. The special administratrix employed a Mr. Gassaway to examine and report upon the condition of the mine. He did so, and she paid him \$565. The Robinson estate also owned stock in the North Bloomfield Mine. The expenditure is justified by the special administratrix upon the ground that it was her duty to inform herself of the value of the stock "because she was pushing the Robinson estate stock to sale, and there were parties seeking to purchase the Bell estate stock." This item was likewise properly rejected. It was no part of the duty of the special administratrix, nor, indeed, was it within her power as special administratrix to sell this property. Her duty, so far as the Bell estate was concerned, was to preserve it, and, for the reasons heretofore given, the expenditure was not authorized as being an

effort to determine the value of the stock of the Robinson estate.

3. The court refused to allow an item of \$120 paid to a detective agency for services in watching the office occupied by Mr. Staacke and Mr. Maxwell, the former executors of the will of Bell, who had been removed at the suit of Mrs. Bell. The special administratrix testified that Staacke and Maxwell had not yet turned over all the papers to her, and that she believed that they were criminals, but she failed to cite any instance in which either of them ever endeavored to conceal or make away with any of the papers, and the utmost shown in this regard was, that certain letters addressed to George Staacke, and relating to some of the property in which the Bell estate was interested, were handed to one of the detectives by Mr. Maxwell when demand was made. She admitted that Mr. Staacke had readily given her all of the papers that she called for, and that he never refused to produce any paper when asked. In this state of the evidence it cannot be said that the court was not justified in refusing to allow this item as a necessary or proper expenditure.

4. In her account as special administratrix Mrs. Bell charged the estate with expenditures incurred by her in her successful efforts to remove the executor George Staacke from office. The amount so charged was \$12.50 by way of taxable costs, and more than \$500 for expenses in no sense taxable as costs, and consisting of \$220 paid to a bookkeeper for examining the books of the executor, \$126.60 to the stenographic reporter of the court for transcribing notes of testimony, \$55.80 paid H. S. Crocker & Co. for printing briefs and the oral argument in the supreme court. These items were one and all properly rejected. Mrs. Bell's action for the removal of the executor was prosecuted by her "as the widow and an heir of the said deceased, and as a creditor of his estate." It matters not that the effect of the proceeding was beneficial to the estate. The attorneys' fees, costs, and expenses are chargeable to the heir or creditor who prosecutes the proceeding. Says Woerner (2 Woerner on Administration, sec. 516): "Nor are the fees of an attorney employed by the heirs, or a portion of them, to contest the settlement, or hasten the administration; nor can the estate be charged with any part of the fees of an attorney who is employed by one of the creditors or bene-

ficiaries, though thereby a fund is realized which is distributable among all the creditors or beneficiaries." The heir or legatee seeking the removal of an executor has no power to deal with and no control over the assets of the estate, and cannot make contracts which in any way will bind the estate, nor can the fact that such heir afterwards becomes special administratrix justify the payment out of the assets of the estate of any such item of expense.

5. The suit of John S. Bell *v.* Staack was defended by the special administratrix. She employed Mr. Blakeman as her attorney, and the court allowed him fees as such attorney. It refused, however, to allow an item of sixty-nine dollars paid to Mr. Worley for engrossing the bill of exceptions in that case. Mr. Worley was a clerk in the office of Mr. Blakeman; but it is said that the evidence shows that the attorney for the administratrix was much pressed for time in preparing the bill of exceptions, that Mr. Worley was compelled to work beyond office hours, and that, as the fees allowed the attorney for his services were exceedingly small, they should be construed to include nothing but strict legal services. But the answer to this is, that it is the duty of the attorney to engross, or cause to be engrossed, the bill of exceptions, and in this sense it is a part of the strict legal duty of the attorney. A special remuneration to his clerk is no more a legal charge against the estate for such services than would be a claim for his salary during the time that he was actually employed upon the work.

In appellant's reply brief she makes mention of the fact that the court in disallowing the item of one thousand dollars paid to Baldwin & Howell as real-estate agents in and about the sale of the Robinson ranch failed to credit her back with \$107.45 and \$87.79 with which she had charged herself, and which moneys were paid to her by other creditors of the estate of Robinson as their proportionate shares of the one-thousand-dollar commission which she had paid to Baldwin & Howell, and, again, that in disallowing the amount paid to Gassaway for his report upon the North Bloomfield Mine, the court failed to allow her the item of \$150, for which she had sold a copy of the Gassaway report, and with which she charged herself. It is manifest that these were errors of inadvertence by the trial court, and would at once have been corrected

upon application to it. It follows, therefore, that the order of the court should be modified as to these items in the respects indicated, and that in all other respects the order stands affirmed, and, as these errors of inadvertence should in the first instance have been called to the attention of the court in probate, appellant, upon this modification, should not be allowed to recover her costs. It is ordered accordingly.

McFarland, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[S. F. Nos. 2856 and 3439. In Bank.—January 3, 1905.]

MILLER & LUX, a Corporation, et al., Respondents, v. ENTERPRISE CANAL AND LAND COMPANY, and JEFFERSON G. JAMES, Appellants; J. C. MOWRY, Intervener, Respondent. [No. 2856.]

MILLER & LUX, Appellant, v. ENTERPRISE CANAL AND LAND COMPANY, and JEFFERSON G. JAMES, Respondents; J. C. MOWRY, Intervener, Appellant. [No. 3439.]

APPEAL—JUDGMENT-ROLL—ABSENCE OF EXCEPTIONS OR EVIDENCE—FINDING.—Upon an appeal taken upon the judgment-roll, without any statement or bill of exceptions, the judgment cannot be reversed where no fatal error appears on the face of the judgment-roll. A finding of fact upon such appeal must be held conclusive if there is no contradictory finding upon the subject.

Id.—WATER-RIGHTS—FINDING AS TO SLOUGH—CONSISTENCY OF FINDINGS.—Upon an appeal so taken from a judgment determining water-rights in the San Joaquin River, a finding that Fresno Slough, upon which the lands of a defendant border, was no part of said river, but was a part of Kings River, is conclusive as to that fact, and is not inconsistent with a finding that at certain stages of the river, or at certain times, some of the water of the San Joaquin River will flow into the slough, and when the level changes will flow back into such river.

Id.—NEED OF WATER—OCCASIONAL OVERFLOW—CONSTRUCTION OF FINDINGS.—A finding that plaintiff corporation has need of the water

of the San Joaquin River appropriated by it is not affected by the further finding that at certain times in each year the river for a short time overflows its banks on to defendants' lands, thus wetting and benefiting the same, and such findings do not show that defendants are entitled to divert some of the water of the river because not needed by plaintiff.

1A.—FINDING OF WANT OF EVIDENCE—INCREASE OF FLOW—RESERVATION IN JUDGMENT—DEFENDANTS NOT PREJUDICED.—A finding that at certain times there is an increase of the flow of the water in the river over ordinary stages, but that there is no evidence before the court whereby it can be determined at what stages of the waters thereof at such times, if at all, water can be diverted therefrom without injury or danger to the plaintiff, and a reservation to the defendants in the judgment of the right to bring an action for the determination of that question, are not prejudicial to the appellants, and are not ground of reversal of the judgment.

1B.—APPEAL FROM ORDER GRANTING NEW TRIAL—CONFLICT OF EVIDENCE.—Upon appeal from an order granting a new trial, generally, where one of the specifications is for insufficiency of the evidence, the order will be affirmed if there is fairly conflicting evidence as to any material finding of fact; and where the evidence is fairly conflicting as to the finding that Fresno Slough was no part of the San Joaquin River, the order must be affirmed.

APPEALS from a judgment of the Superior Court of Fresno County and from an order granting a new trial. J. R. Webb, Judge.

The facts are stated in the opinion of the court, and in 142 Cal. 208, therein referred to.

Octave Du Py, Houghton & Houghton, and Frank H. Short, for Miller & Lux, Respondent and Appellant.

Isaac Frohman, for J. C. Mowry, Intervener, Respondent and Appellant.

W. C. Graves, and Coldwell & Borland, for Enterprise Canal and Land Company and Jefferson G. James, Appellants and Respondents.

McFARLAND, J.—These two appeals were argued and submitted together and will both be considered and determined in this one opinion. They arise out of an action in the superior court entitled Miller & Lux and the San Joaquin and Kings

River Canal and Irrigation Company, plaintiffs, *versus* the above-named defendants. The action was to enjoin the defendants from diverting water from the San Joaquin River. Judgment was rendered in favor of Miller & Lux, enjoining the defendants as prayed for, but the court refused to give judgment for the other plaintiff, who claimed as an appropriator of the water of said river, on the ground that the river was a navigable stream, and that the maintenance of said claimant's ditch and dam by which it diverted the water was a nuisance, and rendered judgment in favor of defendants against said plaintiff canal and irrigation company. From this part of the judgment the said last-named plaintiff appealed, and it was here reversed and judgment ordered for said plaintiff. (See *Lux v. Enterprise Canal etc. Co.*, 142 Cal. 208,¹ where some of the general facts of the whole case were stated; and that appeal is here referred to merely for the purpose of keeping in view the fact that the rights of said plaintiff the canal and irrigation company are not involved in the two appeals now before the court. It is not a party to either of such appeals.)

No. 2856.

This is an appeal by defendants from a judgment in favor of plaintiff Miller & Lux and the intervener, Mowry. Plaintiff and the intervener occupy similar positions, and the affirmance or reversal of the judgment as to plaintiff would necessarily carry a similar affirmance or reversal as to the intervener. Therefore, express reference need be made to the case only as between plaintiff and defendants. This appeal—No. 2856—is upon the judgment-roll alone; there is no bill of exceptions or statement, and consequently there is here no question of sufficiency of evidence to support the findings, and no exceptions to rulings made during the taking of evidence at the trial. The judgment could be reversed only upon some fatal error appearing on the face of the judgment-roll; and we see none. The briefs are quite voluminous; but they go mainly to questions which arise, if at all, in the other appeal,—No. 8439,—which is from an order granting a new trial, and will be noticed hereafter. The case was tried without a jury, and the court made very full findings. Among other

¹ 100 Am. St. Rep. 115.

things it found that plaintiff Miller & Lux was, and for twenty-five years before the commencement of the suit had been, the owner of large bodies of land lying on the San Joaquin River and riparian thereto; that such river is a natural water-course; and that from time immemorial the waters of said river have naturally flowed over plaintiff's said lands, thereby irrigating the lands and making them fit for cultivation and pasturage and supplying water for stock and agricultural purposes, and for all purposes for which the owner of land bordering on a running stream has the right to use the water thereof. It is further found that defendants, long after plaintiff's rights had accrued, and at a point on said river above plaintiff's lands, constructed a dam and ditch by which they obstructed the flow of the water in the river and diverted such water away from said river and prevented it from flowing down and on to plaintiff's lands, as it was accustomed to flow; that such water so diverted is actually needed for the use and cultivation of plaintiff's lands, and that its diversion by defendants has caused and will cause plaintiff great and irreparable damage. It was claimed by defendants that a certain slough called sometimes Kings River Slough and sometimes Fresno Slough, which connects with the San Joaquin River at a point on plaintiff's lands, is a part of said river; and as defendant James owns lands bordering on said slough, though not on the main river, it was contended by defendants that James was a riparian proprietor on the main San Joaquin River, and had certain alleged rights as such riparian proprietor. The court, however, found that such slough was not a part of the San Joaquin River, but is a channel made by another river called Kings River and is "a part of or extension of said Kings River through which the waters of said river flow on their way to the ocean." Of course, as there is no evidence in the record, the finding is conclusive on the point, so far as this appeal from the judgment is concerned, unless there is some other contradictory finding on the subject. Defendants contend that this finding is inconsistent with that part of finding LII which is as follows: "That at certain stages of the river, or at certain times, some of the water flowing in the San Joaquin River will naturally flow into said Fresno Slough and back up said slough for a distance of some twelve miles, but there is no outlet for the waters

flowing into said slough from said San Joaquin River except through the same channel which the water flows from the said San Joaquin River into said slough, and when Fresno Slough becomes filled up and the level changes, then this water which has flowed from San Joaquin River into said Fresno Slough flows back into and down the said San Joaquin River." But it is quite clear, we think, that this finding is not contradictory of the former finding that the slough is not a part of the river. It is also contended that defendants, under any view, were entitled to divert some of the water of the river because it was not needed by plaintiffs on their lands below; but this contention is answered by the finding above referred to that it was so needed. And this finding is not affected by the further finding that at certain times in each year the river for a short time regularly overflows its banks onto defendant's lands, thus wetting and benefiting the same.

Nor is a reversal of the judgment called for on account of the finding in finding No. LVII that during certain times there is an increase of the flow of water in the river over ordinary stages, "but there is no evidence before the court whereby it can be determined at what stages of the waters of said river at such times, if at all, water can be diverted therefrom without injury or damage to the plaintiff Miller & Lux and others owning lands riparian to said river and having vested rights therein as to the flow of the waters thereof," nor on account of that part of the judgment which reserves to defendants the right to bring an action to have it determined at what stages of the water, if any, water may be diverted without injury to plaintiff. If this finding and this part of the judgment are of any consequence at all, they are not prejudicial to defendants, and certainly give to them no cause of complaint.

We do not deem it necessary to further discuss this appeal from the judgment; it is sufficient to say that in our opinion the judgment upon its face is free from error and the findings amply support it. Therefore on this appeal the judgment must be affirmed.

No. 3439.

This appeal is by plaintiff, Miller & Lux, and the intervener, Mowry, from an order of the superior court granting a

motion made by defendants for a new trial. The judge before whom the case was tried, and upon whose decision the judgment was rendered, went out of office before the motion for a new trial was heard, and the motion was granted by his successor.

The motion was made on all the statutory grounds, and there are a good many specifications of the particulars in which, it is claimed, the evidence is insufficient to justify the decision. The language of the order granting a new trial is simply "that the motion of the defendants for a new trial of said action be and the same is hereby granted." There is no intimation in the record enabling us to see upon which of the various grounds of the motion the order granting it was based. This is perhaps unfortunate in a case of this kind; for it may be that the reason for granting the motion was not insufficient evidence, in which event the case might perhaps be more readily disposed of on its real legal merits. However, as the record stands, respondents are entitled to invoke the established rule that the order must be affirmed if it can be justified on any one of the grounds on which the motion was made, and that, as insufficiency of the evidence was one of the grounds, the order must be affirmed if there was fairly conflicting evidence as to any material finding of fact.

If the motion for a new trial had been denied, and defendants were appealing from the order denying it, we could readily say that the evidence was sufficient to justify the decision. But we would not be justified in holding that there was no conflict of evidence as to any material fact found. For instance, it is found "that the said Fresno Slough is no part of the San Joaquin River, but is a channel made from the overflow from Kings River during flood time, and is a part of or extension of said Kings River through which the waters of said river flow on their way to the ocean." This clearly involves a finding of fact; and considering all the evidence touching the nature and character of Fresno Slough, and the sources and condition of the water flowing or being therein, and particularly the testimony of such witnesses of respondents as Anthony, Parker, Chidester, Garner, White, and others, we cannot say that there was no conflict of evidence on the point, or that the judge of the trial court, in view of

such conflict, abused his discretion in granting a new trial. It is contended by appellant that this finding was immaterial, because even conceding that the slough is part of the river, and defendant James therefore an owner of lands riparian to the river, by virtue of his ownership of lands bordering on the slough, still he would have no right, for the purpose of irrigating said lands, to go upon the river at a point many miles above the mouth of the slough, and above plaintiff's lands, and from that point divert water by means of a dam and ditch, and carry it entirely around and away from plaintiff's lands lying above the slough, and thus preventing any of the water so diverted from flowing or seeping back on to plaintiff's said lands. But if we concede this proposition to be true, it would have been available only if the court had merely enjoined defendants from diverting water through the said ditch, which takes water from a point entirely above plaintiff's lands. But the court found that the defendants "were not entitled to take or divert *any of the waters* flowing in the San Joaquin River"; and in the judgment it is decreed that defendants be enjoined "from diverting *any water* out of or from the San Joaquin River, or obstructing the flow of water therein, *at any point* above the lands *or any part of the lands* of the plaintiff Miller & Lux, or of the intervenor, J. C. Mowry," and, further, that they are not "entitled to take or divert any of the waters flowing in the San Joaquin River." This finding and decree holds and adjudicates that defendants have no riparian rights at any point of the river, and is based on the finding that Fresno Slough is not a part of the river; and for this reason the finding that the slough is not a part of the river is necessarily a material finding. For this reason the order granting a new trial must be affirmed. If, as a fact, the court did not grant the new trial on this ground, but did grant it on some grounds which would not be held tenable by this court, the necessity of affirming the order, on the record as it stands, is unfortunate. We apprehend, however, that the parties can avoid a good deal of the expense and labor of a new trial by accepting much of the evidence given at the former trial without requiring it to be repeated.

In the appeal No. 2856 the judgment appealed from is affirmed.

In the appeal No. 3439 the order granting a new trial appealed from is affirmed.

Shaw, J., Angellotti, J., Van Dyke, J., Lorigan, J., and Henshaw, J., concurred.

Rehearing denied

[Crim. No. 1168. In Bank.—January 8, 1905.]

THE PEOPLE, Respondent, v. JOHN H. WOOD, Appellant.

CRIMINAL LAW — MURDER — PROOF OF CORPUS DELICTI — PURSUIT OF ESCAPED CONVICTS — DEATH FROM BULLET-WOUND — AUTOPSY NOT ESSENTIAL.—Upon a trial for murder an autopsy is not necessary as proof of the *corpus delicti*; but it is sufficient proof that death ensued from the wound that deceased, while a young man, in good health, engaged as part of a posse in pursuing escaped convicts to rearrest them, received a bullet-wound which passed through his body from the right to the left side, and that immediately on receiving it he dropped, and within a few minutes was dead.

ID.—EVIDENCE—RECEPTION OF WOUND FROM PURSUED CONVICTS—POSSES —CONFUSION FROM USE OF MAP—PRESUMPTION.—Notwithstanding uncertainty in the evidence growing out of the use of a map at the trial not fully explained by the words of the witnesses, their motions were part of the evidence before the jury, and where there is nothing in the record indicating that the pursuing posses fired at each other, and the evidence, so far as it can be understood, clearly points to the convicts as the persons who fired the fatal volley, it must be assumed that the jury understood the evidence, and properly concluded that deceased was killed by the fire of the convicts, and not by that of another pursuing party.

ID.—PRESENCE OF DEFENDANT—ARTICLES LEFT IN CAMP.—The presence of the defendant with the convicts who fired the fatal volley is shown both by the circumstances of the case and by the finding of articles in a camp which they had hastily broken up after firing the fatal volley, several of which had been previously possessed by defendant. All of the articles so found were admissible as evidence.

ID.—PROOF OF CONSPIRACY TO ESCAPE—THREATS TO KILL.—Evidence was admissible to show a conspiracy among the convicts, including the defendant, to escape from prison, and the declarations of the defendant and other conspirators that they would never be taken alive, and that if the militia came after them they would ambush and kill some of them and then escape.

ID.—SEPARATION INTO PARTIES—COMMON PURPOSE.—The fact of the separation of the conspirators into several parties does not destroy the effect of the plans and threats of the conspirators as evidence tending to show a guilty intent on the part of the defendant and a common purpose in the accomplishment of which the fatal shot was fired.

ID.—EVIDENCE OF TRACKS.—Evidence of tracks leading from the place where the convicts were last seen to the camp from which the fatal shots were fired, and of other tracks found the next day leading away from that spot, were competent to show that the convicts had been there.

ID.—INSTRUCTION AS TO CONSPIRACY—AIDING AND ABETTING COMMON DESIGN—MURDER.—The court properly instructed the jury that "If several persons confined in the state's prison conspire to escape therefrom, and, if necessary, to kill any person who shall lawfully attempt to arrest or recapture them, and the death of a person so engaged in the attempt to lawfully arrest or recapture them ensue in the prosecution of said common design, it is murder in all who are present aiding and abetting in the common design." Its application is limited to those present aiding and abetting at the time of the attempt to make the recapture and the death of a person engaged in the attempt, and does not make defendant liable to conviction if he was not then present.

ID.—CONSPIRACY TO ESCAPE A CRIME.—It was proper to instruct that under section 105 of the Penal Code it is a crime for any person confined in the state's prison for a term less than life to escape therefrom, and that if two or more persons confined in the prison, only one of whom was sentenced to a term less than life, should conspire together and agree to a scheme to escape from the prison, all the persons engaged in the conspiracy are engaged in a conspiracy to commit a crime.

ID.—PROOF OF CONVICTIONS—REQUEST PROPERLY REFUSED.—Where part of the case of the prosecution consisted in proof that each of the escaped convicts, including defendant, had been convicted and sent to the state's prison, and were at the time of the escape serving their sentences, it was proper for the jury to consider such evidence, and it was proper to refuse a requested instruction that the jury were not to consider any other trials or convictions of the defendant as having any bearing on the case.

APPEAL from a judgment of the Superior Court of El Dorado County and from an order denying a new trial.
N. D. Arnot, Judge presiding.

The facts are stated in the opinion of the court.

John P. G. Miller, and William F. Bray, for Appellant.

U. S. Webb, Attorney-General, C. N. Post, Assistant Attorney-General, and C. E. Peters, District Attorney, for Respondent.

SHAW, J.—The defendant was convicted of murder in the first degree and sentenced to death. From the judgment of conviction and from an order denying a motion for a new trial he appeals to this court.

He was one of thirteen convicts who attempted to escape from Folsom Prison on July 27, 1903. On August 1st, according to the theory of the prosecution, he with four other of the convicts were at a place called Manzanita Hill, in El Dorado County, and encountered a posse in pursuit for the purpose of recapturing them. In the conflict that ensued one of the posse, J. Festus Rutherford, was killed, and for his death the defendant was convicted of murder.

It is contended that the *corpus delicti* was not proven, because, it is said, there is no proof that the wound inflicted upon the deceased caused his death. There is no merit in this contention. The deceased was a young man, nearly nineteen years old, a member of the state militia, apparently in good health, and was actively engaged at the time he was shot in pursuing the convicts to rearrest them. He received a wound from a bullet, which entered on his right side, and, passing through the body, came out on the left side some two inches higher than the point at which it entered. Its course was such that it would probably pass through a part of the heart. Immediately on receiving the wound the deceased dropped, and within a few moments was dead. There was no autopsy, and hence it cannot be said with certainty what particular organs of the body were pierced by the bullet. An autopsy is not necessary as a part of the proof that death was caused by a wound of this character. The circumstances above detailed are sufficient to satisfy any reasonable mind that the deceased came to his death by reason of the wound.

It is further contended that the proof of *corpus delicti* is defective because it has not been shown that the bullet which killed the deceased was fired by the defendant or either of the convicts with him. It is true that no witness testified that he saw the defendant on that occasion, but there is sufficient circumstantial evidence to show that the defendant and four

other convicts were camped on Manzanita Hill at the time the posse arrived there in pursuit, and that when the deceased and several others of the posse were within twenty-five or thirty feet of the convicts' camp, and before they had perceived the convicts, they were fired on by the convicts themselves, and that the deceased fell at the first fire. There is much confusion in the testimony, as given in the transcript, as to the whereabouts of the other divisions of the posse at the time this first firing occurred. The defense claims that this first shooting was by some other division of the posse, who fired on the division in which the deceased was engaged. The uncertainty in the evidence as given arises from the fact that the witnesses had before them a large map upon which was designated the topography and the location of the physical objects to which they referred, and that in testifying they would point to the places on the map and designate them by the words "here" and "there." From the manner in which the testimony is reported we cannot determine what places they were referring to or the relative positions of the different places. This uncertainty is caused, primarily, either by the manner of preparing the bill of exceptions or by the failure of the witnesses to describe in words the places referred to at the time they were pointed out on the map. These motions of the witnesses were, however, a part of the evidence, and the failure to report them or describe them in the bill of exceptions does not lessen the force and effect of the evidence as given to the jury, nor authorize us to conclude that it must have been uncertain, or that it required a different conclusion from that reached by the jury. The map was before them, also, and it does not appear that they did not fully perceive and understand the relative positions of the different places. There is nothing in the record indicating to us that the pursuing posses fired on each other. The evidence, so far as it can be understood, clearly points to the convicts as the persons who fired the fatal volley. In this condition of the record we must assume that the jury understood the evidence, and properly concluded that the deceased was killed by the fire of the convicts, and not by a shot from one of the other divisions of the pursuing party.

It is claimed that there is no evidence that the defendant was present with the other convicts at the time, but this claim

is manifestly untenable. Numerous articles were found at the place from which the shots were fired towards the deceased, indicating that there had been a camp at that place which had been hastily broken up and many articles left on the ground. Among these, several were found which had been previously in the possession of the defendant. It is unnecessary to state the evidence in detail. There were numerous circumstances, and, taken together, they were sufficient to prove that the defendant was one of the party encamped on the hill, and that it was this party that fired the shot which killed the deceased.

There was no error in admitting evidence of the conspiracy among the prisoners confined at Folsom, including the defendant, to escape, nor the declarations of the defendant and others of the conspirators that they would never be taken alive, and that if the militia came after them they would ambush them and kill a few and in the confusion thus caused manage to escape. These threats and plans were made by the defendant himself, with the others, and the fact that afterwards he and four others separated themselves from the remainder of the party does not destroy the effect of these plans and threats as evidence tending to show a guilty intent on the part of the defendant and a common purpose, in the accomplishment of which the fatal shot was fired.

We do not clearly understand the point of the objection to the evidence of the tracks leading from the place where the convicts were last seen up to the camp on Manzanita Hill, where the shooting occurred, and other tracks found the next day leading away from the spot. They were admitted for the purpose of showing that the convicts had been on Manzanita Hill. They were clearly competent for that purpose.

The several exhibits taken from the camp on Manzanita Hill were properly admitted in evidence. They consisted of tin cans, a spoon, a barley sack, a hat, and various other articles commonly found about a camp. Their presence at the camp after the party using them had departed indicated a hasty departure, and supported the theory of the prosecution that the convicts had been surprised at their camp, and immediately after the shooting had departed without gathering up these articles. In addition to this reason, as several of them were identified as having been previously in the posses-

sion of the defendant, they were competent as evidence that the defendant was himself present on that occasion.

The court instructed the jury as follows: "If several persons confined in the state's prison conspire to escape therefrom, and, if necessary, to kill any person who shall lawfully attempt to arrest or recapture them, and the death of a person so engaged in the attempt to lawfully arrest or recapture them ensue in the prosecution of said common design, it is murder in all who are present aiding and abetting in the common design. The law makes no distinction or difference between any of the parties so engaged." As we understand the appellant's contention, it is that this is erroneous, because, as he claims, it informs the jury that they could find the defendant guilty if he was one of the thirteen who originally conspired to escape, although he was not one of those present at the time of the homicide. We do not think it can be so construed. The entire case of the prosecution consisted of an effort to prove that the defendant was present at the scene of the conflict in which the homicide occurred. It was never contended that he could be convicted if he were proven to be one of the thirteen who escaped, although not of the number present at the conflict on Manzanita Hill. The jury could not have so understood the instruction, and it is not fairly susceptible of that meaning. Its application is limited by its terms to those who were present aiding and abetting, and this could only be understood to refer to their presence at the time of the attempt to make the recapture. The same objection is made to other instructions, but, taking all of the instructions together, we think the jury could not have supposed that the defendant could be convicted unless they were satisfied from the evidence that he was one of those present at the time of the death of the deceased.

There was an instruction to the effect that, under section 105 of the Penal Code, it is a crime for any person confined in the state prison for a term less than life, to escape therefrom, and that if two or more persons confined in the prison, only one of whom was sentenced to a term less than life, should conspire together and agree to a scheme to escape from the prison, all the persons engaged in the conspiracy are engaged in a conspiracy to commit a crime. We can see no error in the instruction. It is immaterial that the defendant was con-

fined for the term of his natural life, and that there could be no criminal conspiracy under the section of the code referred to with reference to his escape. If he with others conspired to effect the escape of himself and the others, some of whom were imprisoned for a term less than life, such conspiracy would be a crime within the meaning of the law.

After the argument was concluded and the court had formulated its charge, the defendant asked the following instruction, which was refused: "You are further instructed that you are not to consider any other trials or convictions of this defendant as having any bearing on this case; it is your duty to consider no other matters except the evidence and the instructions of this court." The court instructed the jury at great length that they must consider no other matters except the evidence and the instruction of the court. So far as the instruction asked required the jury not to consider evidence of other trials and convictions, it was erroneous, and the court properly refused it. Part of the case of the prosecution consisted in proof that the thirteen convicts had been convicted and sentenced to the state prison, and were at the time of the escape serving their said sentences. It was proper, therefore, for the jury to consider the evidence of such trials and convictions, including that of the defendant.

We have carefully read the evidence and the briefs of counsel, and can find no error in the record. It is true, as counsel says, that many objections made by the defendant's attorney were overruled and many objections to testimony offered by him were sustained. But in each case we think the rulings of the court below were proper.

The judgment and order are affirmed.

Van Dyke, J., Angellotti, J., McFarland, J., Lorigan, J., and Henshaw, J., concurred.

[L. A. No. 1300. Department One.—January 4, 1905.]

BENJAMIN F. ALLEN, Respondent, v. **SHERIDAN A. STOWELL**, **HENRY O. MACE**, and **H. C. MACE**, Appellants.

NUISANCE—DAM CAUSING INJURY TO LAND—DESTRUCTION OF ORANGE TREES—MANDATORY INJUNCTION.—A dam erected by the defendant which caused the waters of a stream to flow out of their natural channel, and to flow over the plaintiff's land, causing irreparable injury thereto by the excavation of deep gulches therein, and the destruction of orange-trees growing thereon, is a nuisance *per se*, which may be abated by a mandatory injunction compelling the defendants to remove so much of the dam as caused the injury.

Id.—USE OF MANDATORY INJUNCTION.—A trespass irreparable in its character and of a continuing nature, or a nuisance, may be restrained by a mandatory injunction, thus restoring things to their original condition. The right to a mandatory injunction does not depend upon the settlement of the rights of the parties at law, nor, if there be a legal injury caused by a nuisance, upon the extent of the damage caused thereby measured by a money standard. The principles upon which mandatory and prohibitory injunctions are granted do not materially differ. The courts are perhaps more reluctant to interpose the mandatory writ, but in a proper case it is never denied.

Id.—LOCATION OF RAILROAD CULVERTS—MISTAKE OF RAILROAD COMPANY—DEFENDANTS NOT JUSTIFIED.—The defendants had no right to build the obstruction to plaintiff's injury for the purpose of correcting a mistake of a railroad company in locating its culverts. Whatever was the effect on plaintiff's land from the defective condition of the railroad, or the location of its culverts, defendants cannot justify or defend their acts on the ground that they were endeavoring to obviate the mistakes of the railroad company and failed, it appearing that their dam was the cause of the injury to plaintiff's land.

APPEAL from a judgment of the Superior Court of Los Angeles County. **M. T. Allen**, Judge.

The facts are stated in the opinion.

Frank Burnett, for Appellants.

James Burdett, for Respondent.

CHIPMAN, C.—Defendants appeal from a judgment for plaintiff granting a mandatory injunction compelling defendants to remove certain dams erected by defendants which caused the flow of water to be diverted from its natural course onto plaintiff's land. The bill of exceptions does not pretend to bring up all the evidence, but, as stated in appellants' brief, "is intended only to present two questions of law adopted by the court and applied to the case." These questions are: 1. Will the remedy of mandatory injunction lie where the evidence is conflicting on the point at issue, unless there first be a verdict of a jury or decision of the court finding that actual—at least nominal—damages have been awarded plaintiff? 2. Did the court err in its ruling that defendants had no right to build the obstruction for the purpose of correcting a mistake of the railroad company in locating its culverts? It appears from the findings of the court that plaintiff's land is planted to orange-trees in full bearing. Prior to the commencement of the action, and when defendants commenced the construction of the dams complained of, "plaintiff demanded of them that they desist and cease from said work and protested against the construction thereof, and explained to them the nature of the damages that said dams would cause him and his said lands and orchards, but defendants refused to abandon said work, or to cease the construction of said dams, and continued the same to completion." It appears from the bill of exceptions, and is substantially found as the facts by the court also, that the evidence of plaintiff tended to show that the dams referred to, which were erected after the railroad company had built its track, were so constructed that "all water flowing down said ancient way . . . would be diverted by said dams from its natural course and caused to flow in one accumulated body southerly along the east of these dams through said railroad culvert and thence in a like body through the lands of S. A. Stowell to the northeasterly corner of plaintiff's land, and would then flow in said accumulated volume with great force southwesterly and diagonally across plaintiff's lands, the natural effect of which would be to destroy a great number of his trees growing upon said land, and to excavate deep gulches and watercourses diagonally through the same; that the construction of said dams would and did arrest and divert water and cause the same to flow upon the

lands of plaintiff as last above found which would not naturally flow there in times of flood and high water"; and this the court found "would cause him [plaintiff] and his said land and orchard great and irreparable injury and damage."

There was a certain part of the dams and wing-dam erected by defendants which the court, "in the absence of results from actual experience," was unwilling to order removed on the evidence then before it, but found certain other portions to be a nuisance, "and should be removed and leveled to the original and natural surface of the ground."

Relief by injunction will be given to prevent a deprivation of ancient rights; and if it be shown that plaintiff's house is by the obstruction which he seeks to enjoin rendered in a substantial degree less fit for purposes of occupation than before, "equity may interfere, even to the extent of making its injunction mandatory by directing the restoration of matters to the condition in which they were before defendant's erection was begun." (High on Injunction, sec. 860.) A trespass irreparable in its character and of a continuing nature may be restrained by a mandatory injunction, thus restoring things to their original condition; health officers may be restrained by mandatory injunction from allowing a sewer to remain open. (Id., sec. 708.) Trespass upon public lands may be enjoined by the United States, and the injunction be made mandatory to compel the defendant to remove obstructions such as fences (Id., 723a); and in a case of a nuisance to a dwelling-house, the injunction will be made mandatory if the circumstances of the case require it. (Id., sec. 792.)

It has been held that a bill to enjoin the erection of a nuisance in close proximity to plaintiff's buildings which contains allegations of irreparable injury to complainant is not demurrable because it fails to show that the rights of the parties have been settled at law. (High on Injunction, sec. 791.)

This court said in *Learned v. Castle*, 78 Cal. 454, that the right to an injunction in a case like the present one "does not depend upon the extent of the damage measured by a money standard; the maxim *De minimis*, etc., does not apply. The main object is to declare a nuisance and to prevent the continuance by a mandatory injunction." The court found that the waters, diverted upon plaintiff's land by the dam erected by defendant would not flow there if allowed to take their

natural course. To thus wrongfully cause water to flow upon another's land which would not flow there naturally is to create a nuisance *per se*. "It is an injury to the *right*, and it cannot be continued because other persons (whether jurors or not) might have a low estimate of the damage which it causes." (*Learned v. Castle*, 78 Cal. 454.) Mr. Wood says: "Every such act is an invasion of another's right, and is actionable because of the injury to the right, whether the damage be great or small. Indeed, the act is wrongful *per se* and in its inception, and is actionable without any special damage." (Wood on Nuisance, sec. 376. See, also, sec. 782.) An obvious distinction between *injury* and *damage*, not always observed in dealing with the question before us, is clearly pointed out by Mr. Wood. (Id., sec. 783.) Speaking of a man's right of dominion over his property and the jealous care with which courts have guarded this sacred right, the author says: "Whatever invades this right is a *legal* injury, whether damage ensues or not. It is a *right*, for the violation of which the law 'imports damage to support it,' and courts of equity have *always* interposed, in a proper case, to protect the right, without any reference to the question of *actual* damage, the motive which instigated the party to invoke its aid, or the benefits that he derives from the act." (Id.) (Italics the author's.)

The principles upon which mandatory and prohibitory injunctions are granted do not materially differ. The courts are perhaps more reluctant to interpose the mandatory writ, but in a proper case it is never denied. It was said in *Johnson v. Superior Court*, 65 Cal. 567: "The jurisdiction of the court to grant a preliminary injunction restraining the defendants from interfering with the flow of water pending the litigation cannot be doubted, and we cannot see that its jurisdiction is exceeded when it requires the removal of the means by which the diversion is made. The ultimate aim of the injunction is the undisturbed flow of the water. The objections to the removal of the means by which the diversion is made are no more cogent than the objections to preventing the diversion of the water itself." As the court has jurisdiction, the only question is, Has it properly exercised its jurisdiction? We need not pursue the subject further. On the showing made in the bill of exceptions it clearly appears that

"the construction of said dams [by defendants] would and did arrest and divert water and cause the same to flow upon the lands of plaintiff as last above found, which would not naturally flow through in times of flood and high water"; and by the finding of the court, presumably on sufficient evidence, the effect of these dams in so diverting the water would be to "destroy a great number of his [plaintiff's] trees growing upon said lands, and would excavate deep gulches and watercourses diagonally through plaintiff's land," rendering a considerable portion of it and the orchards thereon useless, and cause plaintiff and the said land irreparable injury. This was quite sufficient, in our opinion, to warrant the court in granting the relief given by the judgment. (*Rudel v. Los Angeles County*, 118 Cal. 281.)

The second point may be briefly disposed of. Whatever was the effect on plaintiff's land from any defective construction of the railroad company's roadway, or locations of its culverts, defendants cannot justify or defend their acts on the ground that they were endeavoring to obviate the mistakes of the railroad company and failed. Conceding their right to go on their own land for this purpose, the fact remains, as found by the court, that it was defendants' dams that were the cause of the injury. The dams did not merely reinstate natural conditions; they created new conditions. What the court stated it would have held had the facts been otherwise is immaterial and presents no question now for review.

We advise that the judgment be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Van Dyke, J., Angellotti, J., Shaw, J.

[S. F. No. 2247. Department Two.—January 4, 1905.]

**A. G. ROPES, Appellant, v. JOHN ROSENFELD'S SONS,
Respondent.**

VENDOR AND PURCHASER—BROKER'S COMMISSION—EXPIRATION OF CONTRACT.—A real estate broker having a right to a commission on a sale of real estate for finding a purchaser must in order to be entitled to the commission perform the duty of finding the purchaser within the time limited in the contract or an extension thereof by the owner. The fact that he made efforts to sell the property within the time limited, and first called it to the attention of the party who made the purchase, will not entitle him to a commission if he failed to procure the purchaser within the time limited, if the delay was not caused by the negligence, fault, or fraud of the owner.

Id.—CONSTRUCTION OF CONTRACT—TIME LIMIT.—Where the owner on Sunday gave a broker the right to sell the property on certain terms, "subject to prompt reply," which meant that the broker had all of the following day to bring a purchaser, the owner could not withdraw the offer before the expiration of the following day; but the procuring of a purchaser on Tuesday was beyond the time limit, and where the owner sold directly to the same purchaser on that day commissions were not recoverable by the broker.

Id.—SALE NOT RATIFIED—COMPROMISE OF COMMISSIONS—TIME LIMIT NOT WAIVED.—The fact that the purchase money was paid on Tuesday through the broker, and, there being a dispute as to the right to a commission, the money was receipted for by the owner, less one half of the commission, by way of compromise, while the right to the other half was left in dispute, does not show a ratification of the sale or a waiver of the time limit as respects the residue of the commission.

Id.—ACTION FOR COMMISSION—PLEADING—COUNT FOR WORK AND LABOR—OMISSION IN FINDING—EVIDENCE.—Where in the action for the agreed commission there was a second count in the complaint for work and labor, and all of the evidence was directed to the alleged contract and the sale under it, the failure of the court to find on the second count will not justify a reversal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion.

Andros & Frank, and Nathan H. Frank, for Appellant.

Goodfellow & Eells, for Respondent.

CHIPMAN, C.—Action for commission alleged to be due plaintiff from defendant corporation on account of the sale by plaintiff of defendant's steamer, the Peter Jebsen.

It is alleged in the complaint that plaintiff was at all times mentioned therein, and still is, doing business in the city of New York under the firm name of I. F. Chapman & Co., and that "R. J. Chapman of San Francisco, doing business under the firm name and style of J. F. Chapman & Co., was the agent of said plaintiff." It is alleged that on the date above named R. J. Chapman as such agent entered into an agreement with defendant "whereby defendant promised and agreed to pay to said plaintiff a brokerage of five per cent upon \$215,000, provided the said plaintiff would secure the United States navy department as a purchaser of said sum of \$215,000 of the Norwegian steamer Peter Jebsen"; that plaintiff secured the said United States navy department as a purchaser of said steamer at said figure, and defendant received the purchase price on May 26, 1898; that defendant thereafter paid plaintiff one half of said commission, but refused to pay the balance thereof. A second cause of action is for this sum, for work and labor performed in the same matter.

Defendant denies that there was any agreement between plaintiff and defendant other than as follows: That on May 22, 1898, defendant gave said R. J. Chapman a verbal offer to sell said steamer for the amount stated above, less five per cent, "subject to prompt reply" (which the court found was understood by the parties to mean that the "offer would expire and cease to be binding unless the steamer was sold and defendant notified thereof on the following day"). The answer avers that on May 23d "no prompt or other reply had been made to said offer, and on the afternoon of said 23d day of May, the said offer was withdrawn, and the said R. J. Chapman was notified thereof and thereto the said Chapman assented"; denies that plaintiff secured a purchaser for said steamer; denies the payment to plaintiff of any commission or that any commission is still due plaintiff, and alleges that

the defendant sold the steamer to the United States government for \$215,000, "and that on the 26th day of May, 1898, the plaintiff herein paid to this defendant the sum of \$209,625."

The court found as facts that on May 22, 1898, defendant gave R. J. Chapman as agent of plaintiff "a verbal offer to sell the steamer in plaintiff's complaint referred to for the sum of \$215,000 U. S. gold coin, less five per cent thereof 'subject to prompt reply'" (the meaning of prompt reply already stated). That on May 23, 1898, "no prompt or other reply was or had been made to said offer, nor was said steamer on said day sold nor had any purchaser therefor been found; that on the afternoon of May 23, 1898, the said offer of defendant was withdrawn and the said R. J. Chapman as such agent was notified thereof and thereto assented." "That save as hereinbefore set forth there never was any agreement between the plaintiff or his said agent and the defendant respecting the said steamer." That after the said twenty-third day of May, 1898, defendant sold the steamer to the United States government for \$215,000 and that the sale was not made through plaintiff's agency, nor did plaintiff secure the United States navy department as a purchaser of said steamer and that there is not due plaintiff as commission or otherwise any sum whatever. Defendant had judgment, from which and from the order denying his motion for a new trial plaintiff appeals.

The facts disclosed by the record are made up of verbal personal communications, messages by telephone, telegrams, and letters of sundry persons, and testimony at the trial, and are somewhat voluminous. We will endeavor without unnecessary prolixity to state the established facts which appear to us to bear on the points raised in the briefs.

Captain Bradford, chief of the bureau of equipment of the navy department at Washington, on Saturday, May 21, 1898, telegraphed plaintiff in New York: "Am in the market for collier in the Pacific. Have you anything to offer?" Plaintiff thereupon replied by telegraph: "Will name you collier Monday," and also telegraphed to R. J. Chapman, plaintiff's agent at San Francisco: "Make us firm offer immediately if you desire the business. Colliers sale or charter give full description." Chapman called on defendant that afternoon to learn

if it had a collier for sale, and was told it had. The parties agreed to meet next day, Sunday, May 22d, at ten o'clock A. M., and they did so meet. There were present Chapman, Henry Rosenfeld, secretary of defendant corporation, and John and Louis Rosenfeld, the former president of the corporation. The steamer Peter Jebsen was then and there offered to Chapman for \$215,000, less five per cent, or \$205,000 net, "subject to prompt reply." Chapman did not inform defendant nor did defendant know for whom he was acting or to whom he proposed to sell the steamer, but knew in a general way that Chapman was agent for plaintiff here and that plaintiff was in the brokerage business. Chapman telegraphed plaintiff on Sunday at eleven o'clock A. M.: "Offer your firm Norwegian steamer Peter Jebsen" (describing her capacity, etc., briefly, and terms of sale same as above). The time limit, however, was not stated in the telegram. On Monday, about five o'clock P. M., Henry Rosenfeld called up Chapman on the telephone and inquired if they had any reply, who answered, "No, I have nothing yet," and Rosenfeld replied: "Our offer is withdrawn," to which, as testified by Rosenfeld, Chapman answered, "I am sorry," or "I cannot help it. . . . He made one of those remarks." Thereafter, on Monday, May 23d, defendant offered the steamer to Lieutenant Brooks, aide-de-camp of Admiral Kirkland, commandant of the Mare Island navy-yard, "subject to prompt reply," for \$215,000. On the next day, Tuesday, May 24th, about two o'clock P. M., a contract of sale and purchase was entered into in writing between defendant and pay inspector of the U. S. Navy Griffing, who was acting in the matter under the direct orders and by authority of Admiral Kirkland, and the steamer was delivered at the navy-yard by defendant that evening. Defendant had no communication with Chapman on Monday except as shown above, nor did Chapman, so far as appears, inform plaintiff on Monday that defendant had withdrawn its offer. While these events were transpiring at San Francisco plaintiff at New York was dealing directly with the navy department through Captain Bradford, and on Monday, May 23d, telegraphed him a short description of the Peter Jebsen, stating: "Will write full particulars." Receiving no reply to this telegram, one Murray, manager of plaintiff, at New York, went to Washington Monday night, arriving at

Washington Tuesday morning, May 24th. On Tuesday plaintiff was telegraphing Chapman for further particulars about the steamer, and Chapman had also received another telegram in the morning: "Will report Jebesen soon." At 10:30 A. M. Tuesday Chapman telegraphed, and so far as appears for the first time, that "The owners of the Jebesen have given refusal until to-night. Commandant navy-yard here failing, this vessel is still open for business," giving further description of the vessel. Murray received at Washington from New York the following, dated May 24th: "Chapman wires Peter Jebesen telegraph immediately or we shall lose the business. Other parties are making her offer." Some time during that day, Tuesday, May 24th, Murray offered in writing the steamer to Bradford for \$215,000, and Bradford accepted the offer in writing, and at 6:46 P. M. Tuesday a telegram was received at San Francisco from plaintiff and was delivered to Chapman Wednesday morning, May 25th, stating that plaintiff had sold the steamer. Plaintiff had made no offer to sell the steamer prior to Tuesday. During that day some telegrams were exchanged between Bradford and Kirkland, the latter informing the former that the pay-office at San Francisco had purchased the steamer by his (Kirkland's) order, and the former informing the latter that he had purchased her from New York parties on that day, and informing the latter that he (Bradford) intended only that Kirkland should purchase the cargo. It does not appear in what sequence these messages were sent and received. Bradford, however, testified that the bureau gave Kirkland no authority to purchase the steamer, and he expressed the opinion that Kirkland had no such authority. What authority, if any, Kirkland had does not appear; it only appears that he exercised it. There is in the record a letter of the navy department, of April 8, 1898, authorizing the chief of the bureau of equipment to procure information about colliers and after inspection to "recommend to the secretary the purchase of those you deem advisable"; and Bradford testified that he reported the purchase of the Jebesen to the secretary. It also appears that the vouchers were made out in the name of I. F. Chapman & Co., bearing date June 4, 1898, and payment was made to Chapman & Co. It also appears that each party persisted in claiming the sale, and that in the course of the controversy it came

about that defendant agreed on Wednesday, the twenty-fifth day of May, by way of compromise, to accept payment from plaintiff, less two and one half per cent if paid by three o'clock the next day. Chapman came to defendant on time with the money that had been transferred by telegraph to him by plaintiff; he paid defendant \$209,625, and defendant receipted to him for this amount,—i. e. "being \$215,000, less 2½ per cent commission," etc. It was, however, distinctly understood by both parties that defendant claimed that plaintiff was not entitled to any commission, and plaintiff claimed that he was entitled to full commission, and that the balance unpaid both understood was in dispute and was not to be paid unless legally enforceable in view of all the facts.

Construing the findings of the court to mean that the contract was one of brokerage, and accepting the finding as to the meaning of "prompt reply," but challenging the other findings as unsupported by the evidence, plaintiff contends,—

1 That a purchaser was procured by plaintiff and presented to defendant within the time limited; and 2. That plaintiff was the procuring cause of the sale, and it is therefore immaterial (1) whether or not defendant knew that the party with whom it was dealing was induced to do so through plaintiff's instrumentality, or (2) whether plaintiff during the negotiations knew that he was the moving cause of the sale, or (3) whether the sale was actually consummated after the expiration of the time limited. Plaintiff also claimed that defendant ratified the sale by plaintiff. Also that the time limit extended to Tuesday because the contract was made on Sunday. Defendant contends,—1. That plaintiff's right, whatever it was, whether to earn commission or to purchase the steamer, expired on Monday, May 23d, and that the evidence is clear that there was no person able, ready, and willing to purchase the steamer at that time; and 2. That plaintiff in any event did not find the purchaser and was not the moving cause of the sale.

As to the time limit, we think plaintiff had all of Monday in which to make the sale. His time had not expired when defendant attempted to withdraw its offer, and had plaintiff on Monday found a purchaser *then* ready, able and willing to purchase, he would have brought himself within the terms of the contract and would have earned his right to the commission. Defendant could not deprive plaintiff of this right

by revoking the authority given within the time limit. The evidence as to the meaning of the condition "subject to prompt reply" brings the case within the principle discussed in *Blumenthal v. Goodall*, 89 Cal. 256, and distinguishes it from *Brown v. Pforr*, 38 Cal. 550. The distinction lies in the fact that in the latter of these cases there was no stipulation that the contract should remain in force for the time given in which to sell, while in the former there was such stipulation, as we think there was here in effect. But in the former case it also appeared that the purchaser was found within the time limit, while in the present case defendant found no purchaser within that time limit then ready and willing to purchase this vessel.

Plaintiff's contention that because the agreement was entered into on Sunday the limit extended to Tuesday cannot be maintained. If the agreement had been made on Saturday there would be force in the argument that Sunday would be excluded under the statute. (Code Civ. Proc., sec. 11.) But the contract was not then made; on the contrary, the parties agreed on Saturday to meet on Sunday to make the agreement, and it was then made, and Chapman, plaintiff's agent, on that day telegraphed plaintiff the offer. Nor can plaintiff's contention that defendant ratified the sale by plaintiff, and thus waived the time limit, be sustained. The facts clearly show that, in accepting payment for the vessel through plaintiff, both parties reserved their respective rights as they related to the money now in question. And what money was paid as commission was paid by way of compromise, defendant distinctly disputing plaintiff's right to it under the contract, and with equal clearness disputing his right to anything further.

The question remains whether the procurement of a purchaser by plaintiff subsequently to the expiration of the time limit entitled him to commission.

In *Ziemer v. Antisell*, 75 Cal. 509, the court quotes from *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 382: "The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale; and the price and terms on which it is to be made, and until this is done, his right to commission does not accrue." The court then adds this further rule: "It must appear that the broker performed the

duty assumed by him within the time limited in his contract, or within such extension of time as may have been granted by his employer. If he failed to do that, he is not entitled to the commission even though he made efforts to sell the property, and first called it to the attention of the party who subsequently made the purchase, unless the delay was caused by the negligence, fault or fraud of the owner." (Citing *Fults v. Wimer*, 34 Kan. 576; *Wilson v. Sturgis*, 71 Cal. 226.) See, also, *Clark v. Cumming*, 77 Ga. 64,¹ where the broker was given authority to sell "for a certain time and day only."

The Kansas case cited is directly in point and fully sustains the rule above stated. Mr. Mechem says: "For many cases no more satisfactory general rule can be laid down than to ascertain,—1. What did the broker undertake to do? 2. Has he completed that undertaking within the time and upon the terms stipulated? and 3. If not, is the default attributable to his own act or to the interference of the principal? . . . It will be seen from this rule that where the time is limited, the performance must be within that time." (Mechem on Agency, sec. 965.)

Plaintiff cites this same author (sec. 967) where it is said: "If the purchaser is found and negotiations are begun, within the time limited, it is immaterial that they were not fully consummated until afterwards." The case cited in support of the text is *Goffe v. Gibson*, 18 Mo. App. 1. In that case a leasehold was the subject of the sale, the agents having sixty days in which to effect a sale, and it was further stipulated that the owner reserved the right to sell, but if he made the sale "in any wise through their [the agents'] influence or instrumentality, then I [the owner] will pay the above commission." While the contract had yet some weeks to run the agents brought the property to the attention of one Hastings, and pointed out to him that it was more valuable than similar property he was thinking of purchasing, whereupon Hastings, by reason of the fact of the agents having called his attention to the property, entered into negotiations with the owner before the expiration of the time limit and concluded the purchase shortly after the expiration of the limit. What the author probably had in mind is further illustrated by *Wilson v. Sturgis*, 71 Cal. 229. There the broker found a purchaser

¹ 4 Am. St. Rep. 72.

within the time limit, but the completion of the sale was, through the owner's fault, prolonged beyond the time limit, and apparently to avoid paying commissions. It is not easy to deduce a rule from the cases alike applicable to all of this class. The rule laid down in *Zeimer v. Antisell*, 75 Cal. 509, has never been questioned or overruled by this court, so far as we know, and must control the question. There is no evidence that plaintiff's failure to find a purchaser was caused by defendant's "negligence, fault, or fraud." Defendant's notice of withdrawal did not in any wise prevent plaintiff from finding a purchaser, and notwithstanding the persistent and uninterrupted efforts of plaintiff he did not find a purchaser ready and willing to purchase until late on Tuesday.

The failure of the court to find on the second count of the complaint will not justify a reversal. It is not claimed in plaintiff's brief that there was any evidence addressed to this issue, and in fact it was all directed to the alleged contract and sale under it. (*Eva v. Symons*, 145 Cal. 202.)

The finding that plaintiff, through his agent, Chapman, consented to the withdrawal of defendant's offer to sell the steamer rests upon very unsatisfactory evidence. But the view we have taken of the contract makes it immaterial whether plaintiff consented or not.

The judgment and order should be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Lorigan, J., Henshaw, J.

Hearing in Bank denied.

[S. F. No. 3058. Department Two.—January 4, 1905.]

**HUGH L. SHEA et al., Respondents, v. PACIFIC POWER
COMPANY, Appellant.**

ACTION FOR DEATH — BURSTING OF BOILER — REPAIRS — NEGLIGENCE OF ENGINEER — FAILURE TO APPLY BURSTING TEST.—In an action by heirs for the death of an intestate caused by the blowing off of the mud-drum of defendant's boiler, while the deceased was employed as a fireman by the defendant, owing to the negligence of defendant's engineer in failing to employ the bursting test after repairs, the negligence of the engineer whose duty it was to look after the engine and boiler, in failing to see that the boiler was kept in a safe condition, was the negligence of the defendant.

ID.—PROVINCE OF JURY—CUSTOM AS TO TEST—BELIEF OF WITNESSES—CIRCUMSTANCES.—The jury were not bound to take the statement of two witnesses that the bursting test was not usual or customary, as against that of one witness to the contrary, corroborated by the circumstances, showing that it had been treated as the usual and proper test of the boiler in question; and it cannot be held as matter of law under the evidence that it was not necessary or customary to apply the bursting test.

ID.—NECESSITY FOR BURSTING TEST.—If it was necessary to apply the bursting test after the boiler had been originally set up and the mud-drum had been coupled to it, it was equally necessary to apply the same test after the repairs were made as disclosed by the evidence.

ID.—REPAIRS BY INDEPENDENT CONTRACTOR—LIABILITY OF OWNER—REASONABLE DILIGENCE—QUESTION OF FACT.—The owner of an engine and boiler is not absolved from liability on account of the bursting of a boiler merely because an independent contractor was procured to repair it; but the question whether he had used reasonable diligence to keep it in a safe condition, or whether the death was the direct and proximate result of a want of ordinary care on the part of the engineer, was a question of fact for the jury.

ID.—EVIDENCE—FORMER CONDITION OF PACKING-RINGS—OFFER.—It was not error to overrule an objection to evidence of the plaintiff as to the condition of the packing-rings and their efficiency for preventing the oil from getting into the boiler a year or two before the accident, coupled with a statement that it would be shown that this condition of things continued down to the time of the accident.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion.

Van Ness & Redman, for Appellant.

Mullany, Grant & Cushing, for Respondents.

GRAY, C.—This action is brought by the heirs of John H. Shea to recover damages for his death, he having been scalded to death while in the employ of defendant as a fireman, as a result of the blowing off of the mud-drum from defendant's boiler.

The plaintiffs had a verdict for twenty-five thousand dollars. Rather than have a new trial of the case, plaintiffs consented that the judgment should be for ten thousand dollars only. The defendant appeals from the judgment and from the order denying it a new trial.

The main contention of appellant is, that there is no evidence that the blowing off of the mud-drum was in any way the result of defendant's negligence, and hence nothing to show that the death of Shea was caused by the negligence of defendant. It is argued that the parting of the mud-drum from the boiler was occasioned altogether by a structural weakness in the latter, and that it was caused by the failure on the part of the constructor of the boiler to properly bell or expand the nipple which connected the mud-drum with the headers of the boiler-tubes. It would serve no useful purpose to here recite the evidence. It is sufficient to say that in our opinion there was some substantial evidence tending to support the theory that the excessive amount of oil that was allowed to enter the boiler and accumulate there from month to month in some way weakened the holding power of the nipple and caused it to pull out of the mud-drum. The evidence also tended to show that allowing so much oil to enter the boiler might have been avoided by proper care, and that its presence in such large quantities was evidence of a want of ordinary care in handling the engine and boiler. Aside from this it also appears that the boiler had been in use for some four years at the time of the accident. When it was first set up a three-hundred-pound-pressure hydrostatic test was applied to it, otherwise called the bursting test. A few weeks before the accident it had been discovered that the boiler needed repairing; one of the nipples was leaking,

apparently the one that subsequently pulled off. The repairs were made, consisting, among other things, in expanding the end of the nipple which was inserted in the mud-drum. Subsequent to these repairs the bursting test was not applied to the boiler. Two certain witnesses testified that it was not usual or customary to apply this test, but that the test for leaks at a pressure of about two hundred pounds to the square inch was the customary one. Smith, the engineer in charge of the engine and boiler, on the contrary, testified in substance that the bursting test should have been applied, but that he applied only the leaking test after the repairs. A short time thereafter the mud-drum blew off when the boiler was being worked at no greater pressure than two hundred pounds to the square inch. It is apparent that if the bursting test of three hundred pounds had been applied after the repairs the mud-drum would have thereby been blown off, revealing the defective holding power of the nipple, and Shea would not have lost his life in the subsequent explosion. The jury were not bound to take the story of the two witnesses that the bursting test was not usual or customary as against the one witness, corroborated by the circumstances, showing that it had been treated as the usual and proper test of this very boiler. We do not feel warranted in holding that, as a matter of law, the evidence and circumstances developed in this case established that it was not necessary or customary to apply the bursting test. The negligence of the engineer of defendant who ran the engine in failing to see that it was kept in a safe condition was the negligence of the defendant. (*Tedford v. Los Angeles Electric Light Co.*, 134 Cal. 76.) We think the jury were warranted in finding, as we have a right to infer they did find, that the engineer whose duty it was to look after the engine and boiler was negligent in not seeing to it that the bursting test was either applied by himself or some other person after the repairs were completed. If it was necessary to apply this test after the boiler had been originally set up and the mud-drum had been coupled to it, it was equally necessary to apply the same test after the repairs were made as disclosed by the evidence.

It is not, and never has been, the law in this state that the owner of an engine and boiler is absolved from all liability on account of the bursting of the boiler while in his use,

simply by procuring an "independent contractor" to repair it. It is plain that in addition to this he must use reasonable diligence to see that it is kept in repair. Whether he has used reasonable diligence is almost always a question of fact for the jury. And it was for the jury, aided by the trial judge, to measure the evidence, not only as to what witnesses testified to directly but as to the circumstances developed and the inferences to be drawn therefrom and the conclusions of fact to be reached, and thus solve the ultimate question as to whether the death of Shea was the direct and proximate result of the want of ordinary care on the part of defendant's engineer. (*Pacheco v. Judson Manufacturing Co.*, 113 Cal. 541.) We see no ground for interfering with the decision of the court and jury as to the facts in the case. Nor do we find any material error of law in any action of the trial court.

The evidence as to the condition of the packing-rings and their efficiency for preventing the oil from getting into the boiler a year or two before the accident was coupled with a declaration on the part of respondent that it would be shown that this condition of things continued down to the time of the accident. In view of this declaration there was no error in overruling the objection to the evidence.

Some other objections are urged to the rulings of the court in the admission and rejection of evidence, but the evidence excluded or admitted was not of sufficient importance to affect the result in the case, and for this reason we deem it unnecessary to separately discuss each one of these objections.

We see no error of the court in giving or refusing instructions. Indeed the appellant fails to specifically point out any error in this direction.

We advise that the judgment and order appealed from be affirmed.

Harrison, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Lorigan, J., Henshaw, J.

Hearing in Bank denied.

[S. F. No. 230⁰. Department Two.—January 4, 1905.]

EDWARD I. SHEEHAN, Respondent, v. JOSEPH H. SCOTT, Appellant.

ELECTIONS—TAX-COLLECTOR—QUALIFICATIONS FOR OFFICE—RESIDENCE FOR FIVE YEARS BEFORE ELECTION—SAN FRANCISCO CHARTER.—Under the charter of San Francisco the tax-collector must be an elector of the city and county at the time of his election, and for five years previous thereto; and if he has not those qualifications at the time of his election he is not capable of being elected to that office, and will not be entitled to hold the office, even though he has received a majority of the votes cast at the election. It is of no avail that he has the requisite qualifications at the time of taking office.

ID.—CONSTITUTIONAL LAW—LEGISLATIVE POWER—QUALIFICATIONS FOR OFFICE.—The constitution of the state is not a grant of power, and the legislative power which is vested in the senate and assembly includes all power not expressly prohibited to the legislature or elsewhere conferred. Though the legislature cannot increase or diminish the qualifications which the constitution has prescribed for eligibility to the offices created by that instrument, nevertheless, for all offices which the legislature may authorize or establish, it may prescribe such qualifications as in its judgment will best accord with public policy or subserve the interests of those affected thereby.

ID.—QUALIFICATIONS IN MUNICIPAL CHARTER—LEGISLATIVE AUTHORITY OF STATE.—The authority to provide a municipal government is referable to the lawmaking power of the state, and the enactment of a charter for a municipality is a legislative act, and the authority withdrawn from the legislature and given to the city is part of the lawmaking power of the state. The adoption of the charter by the city, and its approval by the legislature, have the same effect as that of a law passed by bill. The provisions of the San Francisco charter in reference to the qualifications for eligibility to the office of tax-collector have been established by the legislative authority of the state, and are valid.

ID.—FINDINGS AGAINST QUALIFICATIONS—RESIDENCE FOR FIVE YEARS—SUFFICIENCY OF EVIDENCE—PROBATIVE FACTS.—A finding of the court that the appellant had not been a resident elector of the city of San Francisco for the period of five years next preceding the date of the election is sufficiently sustained, and must be accepted as correct, in so far as the determination of the court upon the probative facts upon which the ultimate fact depends was made upon conflicting evidence or by reason of inferences from established facts.

ID.—CHANGE OF DOMICILE—BURDEN OF PROOF—DECLARATIONS OF INTENTION—UNION OF ACT AND INTENT REQUIRED.—The burden of

proof was upon the appellant, who had acquired a domicile in another county to prove a change of domicile; and evidence of mere declarations of future intention will not affect the residence until the intention is carried into effect by the completed act. The residence can be changed only by the union of act and intent.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion.

A. A. Moore, and A. Ruef, for Appellant.

Garrett W. McEnerney, and John S. Drum, for Respondent.

HARRISON, C.—At the municipal election held in San Francisco November 7, 1899, the appellant received a plurality of all the votes cast for the office of tax-collector of said city and county, and thereafter the board of election commissioners declared him to have been elected to said office for the term of two years from the first Monday after the first day of January, 1900, and issued to him a certificate of election therefor. The respondent herein—an elector of said city and county—contested his right to the office upon the ground that under the provision of the charter of San Francisco he was not at the time of his election eligible to such office, and on December 22, 1899, filed with the county clerk a verified statement setting forth the particular grounds of such contest. Upon the hearing thereof the superior court found that from the first day of January, 1893, until subsequent to the first day of January, 1895, the appellant was an inhabitant, resident, and elector of the county of Santa Clara, and was not an inhabitant, resident, or elector of the city and county of San Francisco; that he was not an elector of said city and county for five years next preceding the date of the election held on November 7, 1899, nor for five years next preceding the first Monday after the first day of January, 1900, and that he was not at any time during the years 1893, 1894, 1895, until subsequent to the first day of April, 1895, an inhabitant or resident of San Francisco for a period of ninety days, and was not an elector of said city and county until after April 1, 1895, and thereupon held that he was not eligible to the said office of tax-collector and was not duly elected to said office,

and rendered judgment annulling and setting aside his said election and canceling the certificate of election issued to him. From this judgment the present appeal has been taken.

The charter of San Francisco was framed by a board of freeholders elected therefor, and was approved by the legislature January 26, 1899. (Stats. 1899, p. 241.) Section 1 of chapter V of article IV declares (p. 274): "There shall be a tax-collector of the city and county, who shall be an elector of the city and county at the time of his election, and who must have been such for at least five years next preceding such time." Under this provision of the charter, unless the candidate for the office has the qualifications thus named "at the time of his election," he is not capable of being elected thereto, and will not be entitled to hold the office even though he receive a majority of the votes cast at the election. The rule declared in *Searcy v. Grow*, 15 Cal. 118, that if a person is not eligible at the time the votes were cast for him he will not be entitled to hold the office by reason of becoming subsequently qualified, has never been modified in this state. In *Ward v. Crowell*, 142 Cal. 587, and in *State v. Van Beek*, 87 Iowa, 569, cited therein, the statute provided certain qualifications for *holding* the office, but none for rendering the candidate eligible to it.

The appellant, however, urges that the provision in the charter requiring him to have had such qualifications for five years next preceding the election is unconstitutional; that it is not competent for the legislature to prescribe any other qualifications for eligibility to an office than are prescribed in the constitution as the qualifications of an elector, and that, even if it be conceded that this power exists in the legislature, a municipality—which is but a subordinate creature of the legislature—has not such power.

The express declaration in section 1, article IV, of the constitution of this state, that "The legislative power of the state shall be vested in the senate and assembly," includes all the legislative power of the state whose exercise is not expressly prohibited to the legislature, or conferred upon some other body. In the face of this declaration there can be no implication of the absence or non-existence of such power, but whoever would claim that the power does not exist in any particular case, or has been improperly exercised, must point

out the provision of the constitution which has taken it away or forbidden its exercise. "The constitution of this state is not to be considered as a grant of power but rather as a restriction upon the powers of the legislature, and it is competent for the legislature to exercise all powers not forbidden by the constitution of the state, or delegated to the general government, or prohibited by the constitution of the United States." (*People v. Coleman*, 4 Cal. 46.¹)

It is not contended by the appellant that the constitution contains any express inhibition upon the legislature against prescribing qualification for the officers whose appointment or election it may authorize, but he contends that the designation in the constitution of the qualification of certain officers named therein creates an implication that in all other cases no other qualification shall be required than those of an elector. It may be admitted that the legislature can neither increase nor diminish the qualifications which the constitution has prescribed for eligibility to any of the offices created by that instrument; but for all offices which the legislature may authorize or establish, either by virtue of express authority therefor in the constitution itself, or by virtue of its general legislative authority, it may prescribe such qualifications as in its judgment will best accord with public policy or subserve the interest of those affected thereby. That it is of public advantage that an officer shall be acquainted with the duties of his office needs no argument, and it is equally evident that the interest of a community will be better understood and subserved by one who has been identified with that community for a reasonable period of time than by a stranger or by one whose introduction therein has been of recent date. Whether such qualifications shall be required, as well as their character and extent, and the particular offices for which they shall be required, are matters entirely of legislative policy. Such legislation is frequently found upon the statute-book, and by section 54 of the County Government Act itself the district attorney is required to have been admitted to practice in the supreme court of this state.

The authority to provide a municipal government for a city is referable to the lawmaking power of the state, and the enactment of a charter for a municipality is a legislative act.

¹ 60 Am. Dec. 581.

By section 6 of article XI of the constitution, the people have prohibited the legislature of this state from creating municipalities by special laws, and by section 8 of the same article they have given to any city having a certain population the right to frame a charter for its own government, which, if approved by the legislature, shall become the organic act of such city and supersede all laws inconsistent therewith. The people have thus withdrawn from the senate and assembly the legislative authority of the state in reference to municipal government for cities, to the extent that neither of those bodies can exercise any legislative authority in the enactment of a charter for such a municipality until after its provisions have been formulated and approved by the city itself in the manner prescribed by section 8 aforesaid, and have limited their legislative authority to the mere approval or rejection of the charter so formulated. The authority thus withdrawn from the legislature and given to the city is none the less a part of the law-making power of the state because it is contained in the article upon "Cities, Counties, and Towns," rather than in the article upon the "Legislative Department," and the act of the city in formulating the charter and determining the provisions to be included therein has the same force and authority as would a charter with the same provisions enacted by a legislature that was not restrained by any constitutional limitations. Its adoption by the city and approval by the legislature in the manner prescribed by said section is the mode prescribed by the constitution for its enactment, and has the same effect as that of a law which is passed by bill, under the provision of section 15 of article IV. It must be held, therefore, that the provision of the charter of San Francisco in reference to qualifications for eligibility to the office of tax-collector have been established by the legislative authority of the state and are valid.

The finding of the court that the appellant had not been a resident or elector of San Francisco for the period of five years next preceding the date of the election is sustained by the evidence. Whether he had this qualification was an ultimate fact depending upon certain probative facts, and the determination of the superior court upon these probative facts, so far as such determination was made upon conflicting evidence, or by reason of inferences from established facts, must be ac-

cepted as correct. After it had been shown that he had acquired a domicile in the county of Santa Clara, the burden of proof was upon him to show that he had acquired another domicile in San Francisco. It appears from the bill of exceptions that he became a resident of San Jose in the latter part of 1892, and engaged in business therein at that time, and continued to carry on the same until the latter part of February, 1895. In March, 1893, he caused himself to be registered as a voter in that county, and was not registered as a voter in San Francisco until July 31, 1896. His wife accompanied him when he first went to San Jose, and they furnished and occupied a house on St. James Street in that city as their residence, and continued to live there until some time in the month of August, 1894, when they broke up housekeeping, and he went to live at another house on North Fifth Street, where he continued to live until the latter part of February, 1895. He packed up the furniture of their house on St. James Street and stored it in the basement of their house on North Fifth Street, where it remained until he left San Jose. His wife was troubled with asthma, and found the climate of San Jose unfavorable to her health, and when they broke up housekeeping she went to the house of his father in San Francisco and occupied a room there for a while. As stated by her in her testimony: "Mr. Scott had some affairs to settle up his business, and he didn't like to leave me in the city alone, and as I was ill he thought the proper place for me was his parents' home, and so I stayed with them and occupied the front room with Mr. Scott." The bill of exceptions does not show how long she remained at his father's house, or what amount of time she passed there, but during the summer months she visited several mountain resorts for her health, and from them appears from time to time to have returned to her husband at San Jose. She also testified that during the period between her going to his father's house and January 1, 1895, she visited San Jose at least once a week, and sometimes oftener, and at times remained there two or three days, during which she stayed with her husband at the house on North Fifth Street where he was living. A witness who was a housemaid at this place until nearly the end of 1894 testified that the appellant and his wife lived there almost continuously during the time that she was there. The business of the appellant

required him to visit San Francisco occasionally after he went to North Fifth Street to live, and when he made such visits he would go to his father's house to see his wife, if she was then in that city, and at times he would pass the night there. He did not, however, take any house for himself in San Francisco until February 1895, after he had closed out his business in San Jose. He then took a house on Haight Street and shipped his furniture to that place, and went there with his wife to live. Under this evidence the court was justified in finding that he did not become a resident of San Francisco prior to February, 1895.

There was evidence before the court that when the appellant broke up housekeeping at San Jose, it was with the purpose of making San Francisco his place of residence, and many declarations by him of such intention were received in evidence; and it is urged in support of the appeal that as the domicile or residence of a person depends upon the intention with which he selects his place of abode, the court should have held that this evidence of intention, coupled with his wife's taking up her abode at his father's house, in pursuance of the agreement to that effect, and his subsequent removal to San Francisco, made him a resident of that city in August, 1894. The defect in this argument is, that however strong his intention may have been, it was not accompanied or followed by any immediate execution. These declarations all looked to the future, and were merely indicative of a purpose, but were not expressions giving character to the performance of an act. Declarations of the intention with which an act is done may illustrate the character of the act as a part of the *res gestae* (*Wright v. Boston*, 126 Mass. 161; Code Civ. Proc., sec. 1850), but are entitled to but a little, if any, consideration when made either as a narration of a past act or as indicating the purpose with which an act is to be done in the future. The residence of a person will not be affected by such declaration until the intention is carried into effect by the completed act.

"A change in the domicile of a person cannot be effected by an intention in the mind to make this change unless it is accompanied by an actual change in the place of abode." (*Pickering v. Cambridge*, 144 Mass. 244.) "The residence can be changed only by the union of act and intent." (Pol. Code, sec. 52 [7].) "The mere intention to acquire a new residence

without the fact of removal avails nothing; neither does the fact of removal without the intention." (Pol. Code, sec. 1239 [9]. See, also, *State v. Frest*, 4 Harr. (Del.) 558; *Murphy v. Hunt*, 75 Ala. 438; *Foss v. Foss*, 58 N. H. 233.)

We advise that the judgment be affirmed.

Cooper, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Henshaw, J., McFarland, J., Lorigan, J.

[S. F. No. 2375. Department Two.—January 7, 1905.]

JOSEPH H. SCOTT, Respondent, v. EDWARD I. SHEEHAN, Appellant.

OFFICE OF TAX-COLLECTOR—FORCIBLE POSSESSION—OFFICER DE FACTO—INJUNCTION—TITLE NOT INVOLVED.—Where an ineligible person elected to the office of tax-collector, and having the certificate of election, took forcible possession thereof from the incumbent holding over, who believed in good faith that he had the right to retain possession, and resisted such forcible possession, and the court found that the intruder was in possession of the office and was *de facto* tax-collector, when an action was commenced by him to enjoin the incumbent from interfering with him in the performance of his duties, the title to the office was not involved in such suit, and cannot be inquired into, and the defendant by resisting the intrusion and obeying the injunction, has lost none of his legal rights.

Id.—FINDING SUPPORTED BY EVIDENCE.—Where it cannot be said that there was not sufficient evidence before the court to justify its finding that the plaintiff had entered upon the duties of his office, it was proper to enjoin the defendant from interfering with the plaintiff.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Carroll Cook, Judge.

The facts are stated in the opinion of the court.

Garret W. McEnerney, and John S. Drum, for Appellant.

Wal. J. Tuska, for Respondent.

HENSHAW, J.—These appeals are from the judgment and from the order denying defendant's motion for a new trial. The judgment enjoined the defendant from interfering with the position held by the respondent of the office of tax-collector of the city and county of San Francisco and awarding damages and costs of suit.

Sheehan was tax-collector of the city and county of San Francisco; Scott was elected to succeed him. Sheehan in good faith believing that Scott was ineligible to fill the office, and that his election to fill the office was a nullity, and that he was entitled to hold the office until the election and qualification of a person eligible to hold the same, refused to surrender possession of the offices, books and records therein contained, and commenced an action against Scott to contest his election under subdivision 2 of section 1111 of the Code of Civil Procedure. The result of the judgment in that action was a declaration of the ineligibility of Scott, which judgment has been affirmed upon appeal to this court. (*Sheehan v. Scott, ante*, p. 684, filed January 4, 1905.) Pending the determination of that action, however, Sheehan being advised that Scott proposed to take summary possession of the offices, barricaded the doors and entrances so as to protect himself in the possession, and it is found that all of the preparations which he made were reasonable and necessary according to his information, to enable him to maintain the possession of the office, and made upon his part solely by reason and on account of the threats and preparations made by plaintiff; that at noon, upon January 8, 1900, the day and hour when the newly elected officer was to enter upon the discharge of his duties, Scott made demand upon Sheehan to surrender possession, and, upon his refusal so to do, Mr. Scott's legal adviser told him to take possession. The result is summed up in the finding of the court as follows: "That thereupon a number of persons in confederation with plaintiff, Joseph H. Scott, acting under the orders of said Scott, and the said Scott himself, jumped over the counters and chairs in the tax-collector's office and struck, beat, bruised, and maimed a number of men in the occupation of said office, by the leave and upon the direction of the defendant Edward I. Sheehan, and undertook

to take possession of said office and maintain such possession by force, and to drive out said Sheehan, his deputies and the other persons in said office by leave of said Sheehan. The said Joseph H. Scott and a number of other persons acting under his orders and by his directions, did from shortly after noon until the surrender of the occupation of the rooms of tax-collector, by and in pursuance of the injunction as hereinafter alleged, occupy and hold by force a portion of one of the rooms of said tax-collector. Whatever possession the plaintiff had of either of said rooms, or said office, before the time of the service upon the defendant of the injunction was had and procured by force in the manner above stated and against the will and contrary to the desire of the defendant." In this situation of affairs Scott sued to enjoin Sheehan from interfering with him in the conduct of his office, averring that upon the 8th of January, at the hour of noon, he had entered upon the discharge of his official duties, and at the time of the commencement of the suit still was the incumbent of the office, and acting *de facto* tax-collector. The court found that the plaintiff Scott was in possession of the office at the time of the commencement of the action. It is contended that this finding is contrary not only to the evidence, but to the finding above quoted. It is of course well settled that the possession of an office does not depend upon the mere physical possession of the rooms and appurtenances ordinarily used in the performance of the duties. Yet, in many instances, as in this, such possession is convenient, if not necessary, to the orderly performance of the duties which pertain to the office. It is of course equally well settled that in an action such as this, the title to the office is not involved and cannot be inquired into. In view of the decision of this court, to which reference has been made, deciding that Scott was ineligible to fill the office, and in view of the further fact that the term of office has long since expired, it becomes a question purely of academic interest to review the conflicting evidence and to decide whether or not Scott had such possession of the office as to have justified the court in enjoining Sheehan from interfering with him in the performance of his duties. Sheehan having taken all proper steps to resist Scott's claim and attempted intrusion, has not of course imperiled nor lost any of his legal rights. But, as is said in *Sullivan v. Haacke*,

5 Ohio N. P. Rep. 26: "How futile then to urge the court to adjudge that the plaintiff has been removed. Can the court so adjudge without first trying the question of title and determining that the title is in the defendant? Clearly no; to find that the defendant has been removed necessarily decides the question of title, and this cannot be undertaken here." So in this case it cannot be said that there was not sufficient evidence before the court to justify its finding that Scott had entered upon the discharge of the duties of the office, and, that being so, it was proper to enjoin the defendant from interfering with the plaintiff. While obeying the injunction, as has been said, the defendant sacrificed none of his legal rights.

The judgment and order appealed from are affirmed.

McFarland, J., and Lorigan, J., concurred.

[S. F. No. 2889. Department Two.—January 7, 1905.]

THOMAS MCGARRIGLE, Respondent, v. ROMAN CATHOLIC ORPHAN ASYLUM OF SAN FRANCISCO, Appellant.

DEED—LIFE ESTATE—INOPERATIVE GRANT OF REMAINDER—REVERSION IN GRANTOR.—A deed conveying a life estate to the grantee named therein, and after the description declaring that "it is the purpose of the party of the first part by this deed, that after the death of the said party of the second part, the said described lands shall become and be the property of the Roman Catholic Girls' Orphan Asylum of San Francisco, state of California," contains no operative words of grant to such asylum, and conveys to it no present interest in the property. The reversion was left in the grantor, and it required some future conveyance or some testamentary disposition to effectuate its transfer to the orphan asylum.

ID.—PRESENT INTEREST REQUISITE TO A DEED.—It is fundamental that while possession or enjoyment of an estate may be deferred, a deed, to be operative, must pass a present interest.

APPEAL from a judgment of the Superior Court of Sonoma County and from an order denying a new trial. Albert G. Burnett, Judge.

The facts are stated in the opinion of the court.

D. C. Murphy, John L. Seawell, and Frank J. Sullivan, for Appellant.

J. M. Thompson, and C. H. Pond, for Respondent.

HENSHAW, J.—This action was to quiet title to forty-two acres of land in the county of Sonoma. Cordelia Jones during her lifetime conveyed an estate in the land in question to the plaintiff, who was her nephew. Subsequently, she died, and in the probate of her estate this land was distributed to Catherine McGarrigle, the mother of this plaintiff, subject to a life estate in plaintiff. Thereafter Catherine McGarrigle conveyed her fee to plaintiff, who instituted this action. Defendant claims by the deed above referred to from Cordelia Jones to the plaintiff, and the construction of that instrument is determinative of this case. It is in language as follows:—

“This indenture, made this 10th day of February, in the year of our Lord one thousand eight hundred and ninety-nine, between Cordelia Jones of Sonoma County, state of California, the party of the first part, and Thomas McGarrigle of the same place, the party of the second part,

“Witnesseth, that the said party of the first part, for and in consideration of the sum of love and affection and one dollar money of the United States of America, to her in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold, conveyed and confirmed, and by these presents does grant, bargain and sell, convey and confirm unto the said party of the second part, during his lifetime, all that certain lot, piece or parcel of land situate, lying and being in the township of Santa Rosa, county of Sonoma, state of California, and bounded and particularly described as follows, to wit: [Here follows description.]

“It is the purpose of the party of the first part by this deed, that after the death of the said party of the second part, the said described lands shall become and be the property of the Roman Catholic Girls’ Orphan Asylum of San Francisco, state of California.”

It is upon the italicized portion of this conveyance that appellant relies, but we are of opinion that the trial court correctly construed this clause as containing no operative words

of grant, and as failing to convey any present interest in the property. It will be noted that the appellant is nowhere mentioned as a grantee in the deed, and that the language of the clause is but an expression of the grantor's purpose in the future disposition of the property. It left in her a reversion after the life estate to Thomas McGarrigle, which required some future conveyance, or some testamentary disposition, to effectuate its transfer to the orphan asylum. But not only was there a failure of operative words to convey to the asylum, but no present interest can be said to pass under the language which was employed. It is fundamental that, while possession or enjoyment of an estate may be deferred, a deed to be operative must pass a present interest. This was not done by the instrument in question. The express purpose was—giving to it its fullest effect—that the land should become the property of the orphan asylum after the death of McGarrigle, but should not become its property before. Such attempted dispositions have been uniformly held to be inoperative in deeds. (*Bigley v. Souvey*, 45 Mich. 370; *Leaver v. Gauss*, 62 Iowa, 314; *Reed v. Hazelton*, 37 Kan. 321; *Sperber v. Balster*, 66 Ga. 317; *Pinkham v. Pinkham*, 55 Neb. 729; *Cunningham v. Davis*, 62 Miss. 366; *Donald v. Nesbitt*, 89 Ga. 290.)

The judgment and order appealed from are therefore affirmed.

McFarland, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[S. F. No. 3759. In Bank.—January 7, 1905.]

UNION SAVINGS BANK OF SAN JOSE, Respondent, v.
JEREMIAH LEITER, Appellant.

BANKS—INSOLVENCY—ASSESSMENT FOR UNPAID STOCK—AUTHORITY OF DIRECTORS—PROVISIONS OF CIVIL CODE—ELECTION TO SUE.—The directors of a savings bank which has been adjudged insolvent at suit of the attorney-general, on notice of the bank commissioners, may, for the purpose of liquidating its indebtedness and paying its

creditors, levy an assessment upon the unpaid capital stock for a sufficient sum to pay the creditors in accordance with the provisions of the Civil Code relative to assessments; and if not paid may elect to proceed by suit to recover the amount of the same.

ID.—BY-LAW NOT EFFECTIVE AGAINST CREDITORS—STATUTE PART OF CONTRACT.—A by-law of the bank forbidding the directors to levy an assessment of a greater amount than thirty per cent of the capital stock, except by a two-thirds vote of the stockholders, may be attacked by creditors without notice, and must be construed in connection with the provisions of the statute authorizing the levy of a sufficient assessment to pay the creditors of the insolvent bank, and is ineffective so far as conflicting with the statute, which entered into and became a part of the subscriber's contract with the corporation.

ID.—STATUTE OF LIMITATIONS.—If the statute of limitations may be deemed applicable to the case, it does not begin to run against the right to enforce an assessment upon the stockholders on account of unpaid stock of the insolvent bank until the levy has been made and the directors have elected to proceed by action.

ID.—EFFECT OF UNPAID ASSESSMENT—RUNNING OF STATUTE—POWER OF DIRECTORS—NEW ASSESSMENT.—Where nothing was ever paid upon a former assessment levied upon the unpaid capital stock, and it was declared rescinded and waived, though it may be conceded that the statute of limitations began to run against it, yet the assessment not being paid the power of the directors in liquidation to levy assessments under subdivision 1 of section 332 of the Civil Code was not exhausted, and the statute of limitations as to a new assessment did not commence to run prior to its levy.

ID.—PAYMENTS TO CREDITORS UNDER JUDGMENTS—CAPITAL STOCK.—Payments made by the defendant to creditors of the bank under judgments against him by such creditors, upon defendant's liability to them under section 322 of the Civil Code, cannot be considered as payments made upon the capital stock.

ID.—REPEAL OF BANK COMMISSION ACT—JUDGMENT AND POWER OF DIRECTORS NOT AFFECTED.—The repeal of the Bank Commission Act on March 2, 1903, without any saving clause as to pending litigation, could not effect a judgment theretofore given in pursuance of its provisions decreeing a bank insolvent and requiring it to proceed under the management of its directors to close up its affairs and liquidate its indebtedness. Nor could such repeal affect the power of the directors to levy and collect an assessment upon the unpaid capital stock under the Civil Code.

APPEAL from a judgment of the Superior Court of Santa Clara County. A. L. Rhodes, Judge.

The facts are stated in the opinion of the court.

S. G. Tompkins, and S. F. Leib, for appellant.

The shares were issued under the by-law as fully paid at the rate of thirty cents per share, under a contract that no further call should be made except by a two-thirds vote of all the stock. The corporation suing upon the stock must take the by-law as they find it, and both the company and the creditors are bound by such contract until it is set aside as a fraud upon them. (*Scoville v. Thayer*, 105 U. S. 156.) There is no allegation of fraud or of ignorance of the creditors. If they had notice of the by-law they cannot recover. (*Bent v. Underdown*, 156 Ind. 516, and cases cited; *First Nat. Bank of Deadwood v. Gustin etc. Mining Co.*, 42 Minn. 327;¹ *Hospes v. Northwestern etc. Co.*, 48 Minn. 174.²) One claiming the benefit of want of notice must allege it. (*Long v. Dollarhide*, 24 Cal. 218; *Wilhoit v. Lyons*, 98 Cal. 413; *Beattie v. Crewdson*, 124 Cal. 579; *Jordan v. Grover*, 99 Cal. 194.) Fraud must be alleged and proved with particularity. (*Truett v. Onderdonk*, 120 Cal. 588.) The action is barred by limitation within two years, being upon an implied contract to pay the residue of the subscription. (Civ. Code, sec. 332, subd. 1; *Glenn v. Saxton*, 68 Cal. 358; *Walter v. Merced Academy Assn.*, 126 Cal. 583-585; *Vermont etc. Co. v. Declez etc. Co.*, 135 Cal. 588; *Webster v. Upton*, 91 U. S. 65, 69; *Sanger v. Upton*, 91 U. S. 64; *Handley v. Stutz*, 139 U. S. 417.) The repeal of the Bank Commission Act in 1903 abated the suit by the statutory trustees who were acting under that act. (*Argues v. Union Savings Bank*, 133 Cal. 140; 23 Am. & Eng. Ency. of Law, 1st ed., p. 501, note; *Napa State Hospital v. Flaherty*, 134 Cal. 318; *Musgrove v. Vicksburg etc. R. R. Co.*, 50 Miss. 677; *Denver etc. Ry. Co. v. Crawford*, 11 Colo. 598; *Union Pacific Ry. Co. v. Proctor*, 12 Colo. 194; *South Carolina v. Gaillard*, 101 U. S. 433; *Sherman v. Grinnell*, 123 U. S. 679; *Gurnes v. Patrick County*, 137 U. S. 141; *National Exchange Bank v. Peters*, 144 U. S. 570.)

E. M. Rea, and Francis J. Heney, for Respondent.

The by-law was void as to creditors of the insolvent bank, acting under the Civil Code (sec. 332), in levying an assessment for their benefit. (*Union Savings Bank v. Dunlap*, 135

¹ 118 Am. St. Rep. 510.

² 31 Am. St. Rep. 637.

Cal. 628; *People's Home Savings Bank v. Superior Court*, 104 Cal. 649;¹ *Sullivan v. Triunfo etc. Co.*, 29 Cal. 586; *Brewster v. Hartley*, 37 Cal. 15;² *Vermont Marble Co. v. Decles Marble Co.*, 135 Cal. 579;³ *Scoville v. Thayer*, 105 U. S. 143; *Sanger v. Upton*, 91 U. S. 56; *Upton v. Tribilcock*, 91 U. S. 45; *Wells v. Black*, 117 Cal. 157;⁴ Thompson on Corporations, secs. 1562, 1564, 1566, 1578, 1607; Cook on Corporations, secs. 28, 31, 32, 42, 76.) The statute cannot run against a call for unpaid assessments until the call is made. (*Glenn v. Saxton*, 68 Cal. 353; *Hawkins v. Glenn*, 131 U. S. 319; *Glenn v. Liggett*, 135 U. S. 533; *Morgan County v. Allen*, 103 U. S. 498; *Scoville v. Thayer*, 105 U. S. 143; *Hatch v. Dana*, 101 U. S. 205; *Glenn v. Marbury*, 145 U. S. 499; *Glenn v. Howard*, 81 Ga. 283;⁵ *Glenn v. Semple*, 80 Ala. 159;⁶ *Vanderwerken v. Glenn*, 85 Va. 9; *Lehman v. Glenn*, 87 Ala. 618; 13 Am. & Eng. Ency. of Law, 2d ed., p. 721; 1st ed., vol. 23, p. 614.) The rights vested in the judgment could not be affected by the repeal of the Bank Commission Act. (*Bingaman v. Robertson*, 25 Miss. 390; *In re City Bank of Buffalo*, 10 Paige, 378; *Nevitt v. Bank of Port Gibson*, 14 Miss. (6 Smedes & M.) 513; *Berry v. Bellows*, 30 Ark. 198; *Norris v. Trustees of Abingdon Academy*, 7 Gill & J. 7; *Lavender's Lessees v. Gornell*, 43 Md. 154; *Commonwealth v. Order of Vesta*, 156 Pa. St. 531.)

ANGELLOTTI, J.—This is in form an action by a banking corporation to recover from a stockholder the amount of an assessment levied for an amount unpaid upon the capital stock for the purpose of satisfying the claims of creditors of such corporation. Plaintiff had judgment, and defendant appeals therefrom upon the judgment-roll.

The findings fully present the facts essential to the determination of the questions presented by defendant's brief.

The plaintiff corporation ever since March 13, 1899, has been engaged solely in closing its affairs and liquidating its indebtedness under a judgment given on that day by the superior court of Santa Clara County, in an action brought by the attorney-general, in pursuance of notification from the bank commissioners, who had determined that the plaintiff

¹ 43 Am. St. Rep. 147, and note.

² 99 Am. Dec. 237.

³ 87 Am. St. Rep. 143.

⁴ 59 Am. St. Rep. 163.

⁵ 12 Am. St. Rep. 318.

⁶ 60 Am. Rep. 92.

was insolvent. The proceedings and judgment were had under the provisions of the act creating a board of bank commissioners and prescribing their duties, approved March 30, 1878, as amended in 1887 and 1895. The nature and effect of this amended act have been so fully discussed in comparatively recent opinions of this court as to render further statement in that regard unnecessary. (See *Argues v. Union Savings Bank*, 133 Cal. 139; *Bank of National City v. Johnston*, 133 Cal. 185; *Union Savings Bank v. Dunlap*, 135 Cal. 628.)

Ever since the judgment of the superior court was given the directors of the plaintiff corporation, appointed in the manner provided by the act, have been in the possession and control of the corporation and its assets, for the purpose of closing its affairs and liquidating its indebtedness in accordance with the provisions of said act. The capital stock of such corporation was one million dollars, divided into ten thousand shares of the par value of one hundred dollars each. On this only thirty dollars per share had been paid at the time of the adjudication in insolvency. On May 22, 1899, the directors in liquidation levied an assessment of ten dollars per share, which was collected so far as it could be, this defendant, among others, paying the assessment on his shares. On June 7, 1901, solely for the purpose of satisfying the claims of the creditors of the corporation, and it being necessary to so do in order to satisfy such claims, the directors in liquidation, acting strictly in accord with the provisions of the Civil Code relative to assessments (sec. 331 et seq.), levied the assessment in suit of fifty dollars per share, and the same not having been paid, elected to proceed by suit to recover the amount of the same. (Civ. Code, sec. 349.)

Defendant is the owner of fifty-two shares, upon which only forty dollars per share has been paid, leaving sixty dollars unpaid on the capital stock.

It is of course unnecessary to cite authorities in support of the proposition that unpaid subscriptions upon the capital stock constitute assets of the corporation available to its creditors. In a case arising under the provisions of this banking act, Mr. Justice Temple, speaking for the court, after stating this universally recognized proposition, said: "I have no doubt but that in some form the liquidators may, in case of necessity, resort to this fund." (*Bank of National City v.*

Johnston, 133 Cal. 185.) The question as to whether they could do so by the assessment proceedings provided by the Civil Code was not involved in that case and was not decided therein. That question was, however, presented and decided in the later case of *Union Savings Bank v. Dunlap*, 135 Cal. 628, which was an action brought against a stockholder upon the same assessment that is here involved. It was there held that the provisions of the Civil Code relative to assessments furnished a mode for the collection of unpaid subscriptions which might be followed. This was but following the general views announced in prior decisions as to the *status* and powers of the directors in liquidation,—viz., that they are trustees invested with all the powers theretofore possessed by the corporation, so far as the same are appropriate in effecting “an equitable and economical distribution of the assets of the insolvent bank among its creditors,” and that they can exercise such powers in the name of the corporation. They are therefore expressly authorized by the provisions of the Civil Code to levy an assessment for such a percentage of the amount unpaid upon the capital stock as will raise an amount sufficient to satisfy the claims of the creditors of the corporation (Civ. Code, secs. 331, 332) and, so electing to do (Civ. Code, sec. 349), enforce the collection thereof by suit in the name of the corporation. This much is apparently established by the *Dunlap* case, and is not seriously disputed by learned counsel for defendant. The record in this case, however, presents several questions that were not presented in that case.

1. Section 1 of the by-laws of the plaintiff corporation was as follows, viz. :—

“The name of this corporation is and shall be ‘Union Savings Bank of San Jose’; the capital stock is and shall be \$1,000,000, divided into 10,000 shares of \$100 each, 30 per cent of which shall be paid up; no further call for payments upon the capital stock shall be made except by a two-third vote of all stock issued and outstanding.”

There has never been any call for the unpaid capital by a “two-third vote” of the stockholders.

It is urged that this by-law is a complete bar to a recovery in this action, the contention being that this action can be maintained only upon the theory of an unpaid subscription which defendant has expressly or impliedly agreed to pay,

and that the by-law shows an express agreement to the effect that in no event shall more than thirty dollars per share be required to be paid by a stockholder, except upon a contingency which has not happened.

It is unnecessary to here discuss the question as to the effect of an agreement of the nature here claimed to have existed between a corporation and its stockholders upon the rights of creditors of the corporation, further than to state that it is universally recognized that when properly attacked, it can generally have no force as against such creditors, and certainly never against creditors without notice. (See *Vermont etc. Co. v. Decles etc. Co.*, 135 Cal. 579.¹) The by-law in question, which, so far as material, simply provided that no further call should be made except by a two-thirds vote of all stock issued and outstanding, must be construed in connection with the provisions of the statute. A corporation has no power to adopt a by-law that is not consistent with the constitution and laws of this state. (Civ. Code, sec. 301; *People's etc. Bank v. Superior Court*, 104 Cal. 649.²) So far, therefore, as a by-law may be inconsistent with statutory provisions it must yield. Our statutes make full and complete provision for the protection of creditors of a corporation in this behalf, by expressly authorizing the directors thereof to levy and collect an assessment for such percentage of the full amount unpaid upon the capital stock as may be necessary to satisfy the claims of the creditors. (Civ. Code, secs. 331, 332, subd. 1.) This statutory provision, enacted for the protection of creditors, enters into and becomes a part of every contract between the corporation and its stockholders, whether evidenced by by-law or not, and the corporation cannot, without the consent of the creditors, yield up this power by a contract with stockholders. This power of the corporation, as we have already seen, vests in the directors in liquidation, and may be exercised by them in the name of the corporation in the manner prescribed for its exercise by the corporation.

Considered in connection with these statutory provisions, the by-law relied upon as constituting a contract cannot be held to have reference to any *assessment* that might be thereafter levied in accordance with the provisions of the Civil Code relating to the levy and collection of assessments, but

¹ 87 Am. St. Rep. 143.

² 43 Am. St. Rep. 147, and note.

simply meant that no such call for unpaid capital as might ordinarily, in the absence of a contrary stipulation in the contract of subscription as to the time or manner of payment, be made by the directors by a simple resolution to that effect, would be made, except by a two-thirds vote of the stockholders. An example of this character of case is to be found in *California etc. Co. v. Callender*, 94 Cal. 120,¹ where by the contract of subscription the stockholders had expressly agreed to pay the unpaid portion upon demand. Where, however, there is no such express agreement the promise to pay the unpaid capital upon such a call is implied from the taking of the stock, in the absence of an agreement to the contrary.

Here there was such a contrary agreement, and consequently *such a call* could be made only by a two-thirds vote of the stockholders. But, by virtue of the provisions of the Civil Code relative to assessments, which entered into and became a part of the subscriber's contract with the corporation, the corporation had the power, acting through the board of directors, after one fourth of its capital stock had been subscribed, to levy and collect *assessments* for the various purposes specified in the code, including the power to levy and collect an assessment for the full amount unpaid upon the capital stock, if such amount was necessary to satisfy the claims of creditors of the corporation, or for such percentage thereof as was necessary for that purpose, and this power, so far as amounts unpaid upon the capital stock and necessary to satisfy the claims of the creditors are concerned, was vested in the directors in liquidation.

2. Certain provisions of the Code of Civil Procedure prescribing limitations as to the time within which actions may be commenced were pleaded in bar of this action,—viz., subdivisions 1 and 4 of section 338, subdivision 1 of section 339, and section 359. The trial court expressly found, in terms, that the action was not barred by any of these provisions, but at the same time specifically found the facts from which these general findings were deduced, and it is conceded that the question as to whether these specific findings show a case not barred by the statutory provisions invoked is properly before this court for review.

¹ 28 Am. St. Rep. 92.

This action was commenced on April 2, 1902. The assessment in suit was levied on June 7, 1901, and the election to proceed by action to recover the amount thereof was made on July 12, 1901. Whether the liability of a stockholder to pay an assessment on stock on account of unpaid capital be a liability created by statute within the meaning of subdivision 1 of section 338 of the Code of Civil Procedure, or a liability created by law within the meaning of section 359 of the Code of Civil Procedure, and the limitation thereof three years, or is a liability arising from contract, within the meaning of subdivision 1 of section 339 of the Code of Civil Procedure, and the limitation, therefore, two years, it will be seen that this action was brought within the statutory time after the levy of the assessment here involved.

But the decree of the superior court determining plaintiff corporation to be insolvent, restraining it from further carrying on business, and requiring the bank commissioners to surrender the property of the corporation to the directors thereof for the purpose of liquidation, was made on March 13, 1899, more than three years prior to the commencement of this action.

It is urged that the liability of the stockholder in this case rested upon his implied contract to pay calls made for unpaid subscriptions, and was purely a liability arising upon a contract not in writing, and that the statute requiring actions on such contract to be brought within two years after the cause of action accrues is applicable. It is further urged that while such a cause of action would ordinarily accrue only upon a call made by the directors of the corporation for the unpaid capital, when the corporation was decreed to be insolvent and put into process of liquidation by the superior court, the liability of the stockholders to pay so much of the unpaid capital as was necessary to satisfy the claims of creditors at once became fixed, and the cause of action therefor accrued, and became barred upon the expiration of two years. Upon the general question as to whether in the event of the insolvency of a corporation and its ceasing to be a going concern a cause of action for unpaid capital payable upon call accrues immediately upon insolvency, without any call therefor having been made, there is, it must be conceded, some conflict in the opinions of the federal and state courts that have had

occasion to discuss the proposition. There has, however, been no expression of opinion by this court thereon, except in the case of *Glenn v. Saxton*, 68 Cal. 358, which was an action upon what was called an assessment for unpaid capital for the purpose of paying debts, levied upon stock of an insolvent corporation by a Virginia court. The law of Virginia, the state wherein the corporation was organized, provided that a portion of the capital should be paid at the time of subscription, "and the residue thereof as required by the president and directors," and that if the same was not paid as required it might be recovered by action. It was held by this court, quoting from and adopting and assenting to the views of the court of appeals of Maryland in *Glenn v. Williams*, 60 Md. 93, 122, that the terms of the statute became a part of the contract of subscription; that the subscriber undertook to pay the residue as required by the president and directors; that the call made by the court was the same, in effect, as if it had been made by such president and directors, and that when made, the contract of the defendant to pay became absolute, and the cause of action accrued. In the portion of the opinion of the Maryland court quoted in *Glenn v. Saxton*, and as to which this court said, "In this we entirely agree," is the following, viz.: "After the payment of the two dollars per share, there was nothing due from the subscriber to stock until an authorized call was made for the residue. The contract contemplated the exercise of judgment and discretion on the part of the president and directors as to the times and amounts of future payments on the stock, and there was nothing due from the stockholders until such amounts were determined on and regularly called for. Until a regular call made, there was no unconditional liability on the part of the stockholder to pay. Until then he could not know when to pay or how much he would be required to pay. The subscription, therefore, was conditional, as to the times and amounts of payment; and consequently, there was no fixed obligation of the stockholders to pay, and no right of action against him, until an assessment and call made, either by the president and directors, or by the order of a court of competent jurisdiction. It is for the amount of the assessment made that the right of action accrues, and not for the whole balance of the unpaid subscription, unless the whole amount be called for; and it is

only from the time of the assessment and call made that the statute [of limitations] runs in favor of the defendant." There is nothing opposed to these views in any California case that has been brought to our attention. *Kohler v. Agassiz*, 99 Cal. 9, specially relied upon by defendant, was a case decided upon the peculiar language of the contract of subscription, whereby the defendant had agreed to pay "*in such installments and at such times* as said defendant might under and according to the laws of the said state of California be lawfully called upon and required by said corporation to pay the same," and it was pointed out in the opinion in that case, the question being as to whether the action had been prematurely brought, that this provision did not say anything about the manner in which the corporation should call upon the subscribers. Whether the distinction made by the court in that case was well founded or not is immaterial here, for clearly it was not intended therein to hold that a cause of action for money due only on proper call could accrue before such call was made. The rule stated in *Glenn v. Saxton*, 68 Cal. 358, is concededly the rule of the United States supreme court and the appellate courts of several of the states. As to banking corporations in process of liquidation under the provisions of the Banking Act of 1887, as amended in 1895, and the provisions of our code, we have no doubt that it is the true rule, at least so far as assessments levied under the provisions of the Civil Code for such amount of the unpaid capital as may be necessary to satisfy the claims of creditors are concerned. The reasoning of the Maryland court approved by this court in *Glenn v. Saxton*, 68 Cal. 358, is peculiarly applicable to such case. As was pointed out in *Union Savings Bank v. Dunlap*, 135 Cal. 628, such a corporation, after a decree adjudging it insolvent, while restrained from continuing the banking business, continues to be a corporation until its affairs are closed, and is a going concern for all purposes of liquidation. Subject to certain rights in the court as to the removal and appointment of directors, the management of the affairs of the corporation in liquidation is in the hands of the directors of such corporation, under the direction of the bank commission. These directors are invested with all the powers of the corporation, so far as the same are essential to liquidation, including the power to assess the

stock, so far as is necessary to satisfy the claims of creditors, to the full amount unpaid upon the par value thereof, and collect the amount from the stockholder. The obligation of the stockholder as to this unpaid capital is not to pay the whole amount thereof in any event, but only to pay such portion thereof as such directors, in the management of the affairs of the corporation, may find necessary to satisfy the claims of creditors, and call for in such mode as may be required by the law. Such an obligation involves, as was said in the Maryland case, the exercise of judgment and discretion on the part of the directors as to the times and amounts of payments on account of unpaid capital, and there can be no amount actually due until the amounts are determined on and regularly called for. The directors in the exercise of the powers confided to them are acting not only in the interest of the creditors, but also in the interest of the stockholders, and the act provided a summary process by which the court might remove any director found by it to have been guilty of fraud or negligence, and not a proper person "to be intrusted with the closing of the affairs and business of such corporation *in the interest of the depositors, creditors, and stockholders thereof.*" This provision apparently afforded full remedy to any stockholder who might be aggrieved by any unnecessary delay on the part of the directors in determining upon and calling for such amount of the unpaid capital as might be necessary. The act further provided that the affairs of such a corporation must be closed within four years, unless further time was allowed by the bank commissioners.

We are unable to see how it can be held, under our statutory provisions, that the power of the directors to levy the assessments mentioned in subdivision 1 of section 332 of the Civil Code can be impaired by lapse of time, so long as the corporation is a going concern for purposes of liquidation, or how any provision of our statute of limitations can commence to run as to the amount of any such assessment until the levy thereof.

Much reliance is placed by learned counsel for defendant upon expressions of this court in the opinion in *Harrigan v. Home Life Ins. Co.*, 128 Cal. 531, in support of their contention, that it was within the power of the directors in liqui-

dation to make the demand for the unpaid capital at any time; that it should have been made immediately upon the adjudication of insolvency; and that the statute commenced to run from the time the call might have been made, whether it was made or not. The case cited was an action upon a life-insurance policy, where the covenant of the insurer was to pay "after due notice and satisfactory proof of death," etc., which covenant, this court said, practically called for a demand only, and the well-settled rule that, where a right or claim has fully accrued except for some demand or presentation of claim to be made by the party as a condition precedent to legal relief, which such party can at any time make, if he so chooses, the cause of action has accrued for the purpose of the statute of limitations, was applied. (See, also, *Barnes v. Glide*, 117 Cal. 8;¹ *San Luis Obispo County v. Gage*, 139 Cal. 408.) We are unable to see the application of this rule to an assessment levied under the provisions of the Civil Code. As we view the law of this state upon the subject, the legislature has seen fit to invest the directors in liquidation with the power to inaugurate assessment proceedings to the extent of such amount unpaid upon the capital as they may find necessary for the payment of creditors at any time during the process of liquidation. The matter is one entirely within their discretion, and until the levy of the assessment there is no liability of any kind on the part of the stockholder in regard thereto other than the liability, inseparably connected in this state with the holding of stock in corporations, of being assessed thereon. The levy of the assessment is essential to the creation of the liability which is here sought to be enforced.

Of course, this court did not by merely citing in the opinion in *Harrigan v. Home etc. Co.*, 128 Cal. 531, the case of *Great Western Tel. Co. v. Purdy*, 83 Iowa, 430, in support of the rule applied, adopt the views of the Iowa court as to the application of that rule to the facts of that case.

It perhaps should be stated that the trial court found that it was impossible for the board of directors prior to the first day of March, 1901, to determine with any degree of certainty the value of the assets of the bank, or readily or correctly value the same, but that they might readily have ascertained

¹ 59 Am. St. Rep. 153

at the outset that there was a deficiency of at least two hundred thousand dollars.

Some reliance is placed by defendant upon the fact that on October 27, 1899, the directors in liquidation did by resolution order and levy an assessment of sixty dollars per share, and give notice thereof by mail to this defendant. No further proceeding appears to have been taken thereon. On January 26, 1901, this resolution was by another resolution of the directors declared rescinded, vacated, and set aside, and the right to collect the same waived. Nothing was ever paid thereon by any stockholder. It is urged that the statute of limitations commenced to run in favor of defendant at the date of this levy, if it had not commenced before. As to that assessment, it may be conceded that this contention is well founded. But the assessment not being paid, the amount theretofore unpaid upon the capital stock still remained unpaid, and the power of the directors in liquidation to levy assessments under subdivision 1 of section 332 of the Civil Code was not exhausted. If the board of directors had the power to levy another assessment, as it clearly did under our views as to the law, the statute of limitations as to such new assessment did not commence to run prior to such levy.

On January 26, 1901, the directors again adopted a resolution levying an assessment of sixty dollars per share, which resolution was rescinded on June 7, 1901. There was never any attempt to enforce this assessment. This resolution is entirely immaterial to the controversy as to the statute of limitations, for this action was commenced within two years thereafter, but what has been said as to the resolution of October 27, 1899, is also applicable to this. Defendant's claim as to the statute of limitations is based upon the theory that the liability of the stockholder finds no support in the statute, but comes entirely, if at all, from his implied promise to pay upon call. When it is once established that there also existed an implied promise on his part, imported into his contract by reason of the provisions of our statute, to pay such assessments as might from time to time be levied by the directors in the manner provided by law to meet the claims of the creditors of the corporation, up to the full amount of the unpaid capital, if necessary, the force of his argument is much impaired.

There is much force in the argument that the directors should be required to move promptly in the closing up of the affairs of the bank, both on account of the interests of the creditors and those of the stockholders, but, as we have attempted to show, the remedy for any party desirous of such speedy adjustment is in his own hands. We are satisfied that the trial court was correct in the conclusions reached upon the defense of the statute of limitations.

3. We do not understand it to be contended that payments made by defendant to creditors of the plaintiff, upon judgments obtained against him by such creditors, upon defendant's liability to them under section 322 of the Civil Code, can be considered as payments made upon the capital stock. The law would not sustain such a contention.

4. On March 2, 1903, which was nearly a year after this action was commenced, but prior to judgment, the Bank Commission Act of 1878, as amended in 1887 and 1895, was repealed by an act of the legislature, which act contained no saving clause as to any pending litigation. (Stats. 1903, p. 73.)

It is urged that the effect of this repeal was to destroy the cause of action sued on and abate this action.

We are satisfied that the repeal of this act could not affect the judgment theretofore given in pursuance of its provisions, decreeing the plaintiff corporation insolvent, and requiring it to proceed, under the management of its directors, to close up its affairs and liquidate its indebtedness. The judgment had become final, and had fixed the rights of all parties interested. Thenceforth the directors of the corporation were trustees, charged by the judgment with the performance of such duties as were essential to a closing of the affairs of the corporation in the interests of the creditors and stockholders, and invested by the judgment with all the powers of the corporation necessary therefor. It is true that the Bank Commission Act gave the bank commissioners certain supervisory authority over them, but their *status* as trustees, having all the powers conferred by law upon directors of corporations so far as such powers were necessary to liquidation, was fixed by the judgment.

As such trustees, they levied the assessment in suit, and are proceeding to collect the same by action, not acting under any

authority conferred by the Bank Commission Act, but as directors of the corporation, under authority conferred by certain provisions of the Civil Code relative to corporations, which provisions have not been amended or repealed since the levy. If the right to levy this assessment had been given by the act that has been repealed, or if the effect of the repeal of such act had been to remove the directors from the office of trustee, a case would be presented which might call for the application of the authorities cited by counsel for defendant. It may be suggested that if it be conceded that the repealing act has the sweeping effect of annulling all that has been done under the act repealed, relative to plaintiff, the judgment of the superior court decreeing it insolvent would fall with the rest, and we would have the plaintiff corporation a going concern for all purposes, with all the powers of a going concern, including the power to levy and collect this assessment to satisfy the claims of its creditors, notwithstanding the by-law relied on.

We are then forced to the conclusion that if the repeal did not affect the judgment of the superior court the power of the directors to collect the assessment levied under the provisions of the Civil Code was not impaired by such repeal; and if, on the other hand, such repeal did operate to vacate said judgment and all proceedings had under the act, the corporation continued a going concern, with the power to levy and collect the assessment in suit.

As already stated, however, we are satisfied that such repeal did not affect the judgment of the superior court.

This disposes of all the points made by defendant on this appeal.

The judgment is affirmed.

Van Dyke, J., and Shaw, J., concurred.

BEATTY, C. J., concurring.—I concur in the judgment and generally in the opinion of the court. As to the effect of the call or assessment of October 27, 1899, if a cause of action had accrued to the corporation by reason of the call alone, I think the statute of limitations would have commenced running at the date of delinquency fixed by the resolution, and if it had once commenced running I do not think the subsequent rescission of the call would have extended the time for

commencing the action. But it requires something more than a mere call to establish a right of action under the statute. The call must be followed by a resolution to proceed by action regularly adopted after the assessments have become delinquent. Until the adoption of such a resolution no stockholder can be sued. This was the point, and the only point decided, in *Bank of National City v. Johnston*, 133 Cal. 185, as will more clearly appear from the Department decision reported in 60 Pac. 776, where the facts are more clearly stated. Until the resolution to proceed by action is adopted the whole matter remains, as it was before, in the discretion of the trustees, and they may either rescind the first call and afterwards adopt another, or complete their right of action under the first call by resolving to enforce it by that method.

It may be added that if the statute had been set in motion at the date of the first call in October, 1899, the action was not barred by subdivision 1 of section 338 of the Code of Civil Procedure, and it is by no means clear that this is not an action upon a statutory liability within the meaning of that section.

Besides what is said in the opinion of the court in regard to the effect of the repeal of the Bank Commission Act, I am of the opinion that it was beyond the power of the legislature by the repeal of that act to destroy the only remedy available to the creditors of the corporation for the enforcement of their contract rights.

Henshaw, J., concurred.

Rehearing denied.

[S. F. No. 2995. Department Two.—January 9, 1905.]

GRANT SELFRIDGE, Respondent, v. BLITZ W. PAXTON and BESSIE E. PAXTON, Defendants; BLITZ W. PAXTON, Appellant.

DIVORCE—CUSTODY OF CHILD AWARDED TO MOTHER—NECESSARY SERVICES TO CHILD—DIVORCED FATHER NOT LIABLE.—Where, by the decree of divorce, the custody of an infant child of the parties was awarded to the mother, who by contract with the father agreed to maintain the child in consideration of certain payments, the father, who has not contracted for necessary surgical services rendered to the child, is not liable therefor to a surgeon who knew of the decree and of the award of the custody of the child to the mother.

ID.—CONSTRUCTION OF CIVIL CODE—LIABILITY LIMITED TO CUSTODY OF CHILD.—Under sections 196 and 207 of the Civil Code the duty of a parent to support a child, and the liability of the parent for necessities furnished to the child by a third person, are confined to a parent entitled to the custody of the child and having it under his charge, and no such liability attaches to a parent who has been deprived of such custody and charge.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

James W. Oates, for Appellant.

Morrison & Cope, for Respondent.

McFARLAND, J.—This is an action brought against the defendants to recover for medical and surgical services rendered to Roma W. Paxton, the infant daughter of the said defendants. The case was tried without a jury, and the court made findings and rendered judgment for plaintiff. From the judgment and from an order denying a motion for a new trial the defendant Blitz W. Paxton appeals.

The facts material to the determination of the case are in brief these: For several years prior to the seventeenth day of September, 1894, defendants were married to each other, and during that time the said Roma W. Paxton was born to them

as the fruit of their marriage. On said seventeenth day of September, 1894, the defendants were duly divorced by a decree of court. The decree gave to the defendant Bessie the care and custody of the said Roma, providing, however, that the defendant Blitz might visit the child upon reasonable occasions. But the decree had no provision as to the maintenance of said Roma, and had no other provision whatever. After the date of the decree the defendants lived separately—Blitz residing in Sonoma County and Bessie in San Francisco. Roma resided with her mother and was under her custody in San Francisco. The divorce was obtained at the suit of the wife on the ground of desertion. Afterwards, and about March 19, 1900, Roma, still a minor, became severely ill, and at the request of the mother, Bessie, plaintiff commenced attending her professionally, and continued to do so until some time in the following June. He performed on her some difficult surgical operations. His services were necessary and their value was as found by the court. The first surgical operation was performed a day or two after plaintiff was first called to attend Roma, and on March 22d he wrote to the defendant Blitz informing him of Roma's serious illness and of the operation; and he received a reply dated March 30th, in which said defendant acknowledged receipt of plaintiff's letter and said that he would be obliged if plaintiff would advise him of any change in the patient's condition. Plaintiff at the time he rendered the services knew of the said decree of divorce, and that Roma then was, and for several years theretofore had been, living with and in the custody of the mother under said decree.

The foregoing are perhaps the only facts necessary to be considered, but the following facts also appear: On the day of the divorce the defendants Blitz and Bessie entered into a written contract, which in brief is as follows: Reference is made in the contract to the pending action for a divorce, and Bessie agreed to take upon herself the maintenance of the said Roma, and also another child of the parties, and Blitz agreed to give her \$5,620 in money, which he did then give her, and to pay the premiums on and make certain disposition of a certain policy of insurance, and to pay her, in addition, for the support of the children, \$13,200 in installments of one hundred dollars each month until the whole should be paid,

provided that if both of the children should die before the whole amount was paid, then the payments should cease, and he gave security for the payment of said money; and Bessie released all interest in all other property, whether community or separate property of Blitz.

It is apparent that the evidence does not show any contract, either express or implied, on the part of the defendant Blitz to pay for the said services rendered Roma; and the court does not find any such contract. The finding merely is, that the appellant was notified of the illness of Roma and did not object to respondent's services. The case, therefore, seems to present the naked legal question whether under the law of this state a third person can recover of a father for necessities furnished his infant child when by a decree of court the care, custody, and control of the child has been taken away from him and given to the mother, who, to the knowledge of the person furnishing the services, is exercising such custody under such decree; and our opinion is, that this question must be answered in the negative.

As to what the rule on this subject is under the general law, and without reference to any statutory provision, the decisions in other jurisdictions are no doubt somewhat at variance. In *McKay v. McKay*, 125 Cal. 65, Mr. Justice Harrison, speaking for the court, says: "The question of the father's liability for the care and support of his children after a decree of divorce, in which their custody has been awarded to the mother, has been frequently presented in actions brought therefor by strangers, or by the mother, and courts have almost invariably held that an action against him to enforce such liability could not be maintained" (citing many cases). This would be determinative of the question, if it were not that, perhaps, as contended by respondent, the language above quoted was not necessary to the decision of that case, and was therefore *dictum*. But the rule stated in that case is the one declared by the statutory law of the state—which, of course, must govern. The law as to the liability of a parent for necessities furnished the child comes within the declaration of section 4 of the Civil Code of this state, that "The code establishes the law of this state respecting the subjects to which it relates." The Civil Code, commencing with section 193, under the caption of "Parent and Child,"

clearly "establishes the law" respecting the rights, duties, and liabilities which arise out of that relation; and the law touching the question involved in the case at bar is found in sections 196 and 207. These sections are as follows:—

"196. *Obligations of parents for the support and education of their children.* The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability."

"207. *When a parent is liable for necessities supplied to a child.* If a parent neglects to provide articles necessary for his child who is under his charge, according to his circumstances, a third person may in good faith supply such necessities, and recover the reasonable value thereof from the parent."

By these sections the duty to support a child, and the liability to the third person for necessities furnished it, are clearly confined to a parent "entitled to the custody" of the child, and having it "under his charge"; and no such liability attaches to a parent who has been deprived of such custody and charge. In the opinion delivered by the learned judge of the court below—for whose judgment we have the highest respect—much weight is given to the consideration of the injustice which might follow if a father could escape liability to support his children on account of a decree of divorce founded on his misconduct; and counsel for respondent also urges that consideration. But strong views have been expressed the other way—to the point that a father deprived of the custody, control, and services of his child is not justly liable to third persons who choose to furnish it supplies. In *Ex parte Miller*, 109 Cal. 648, Justice Temple, in a concurring opinion, says: "When a parent is deprived of the custody of his child, and, therefore, of the right to its services and earnings by a summary proceeding, he is no longer liable for its support and education. This is true as a general proposition of law, and it is recognized by our code. Section 196 of the Civil Code provides that a parent entitled to the custody of a child must give him support and education suitable to his circumstances, plainly implying that the parent does not owe that duty to a child when he is not 'entitled to its custody.'"

And he further refers to section 207 as providing that when a parent neglects to provide the necessaries for a child "who is under his charge," then third persons may do so, and recover the value; and he further says that in no instances except those specially provided for in the code "has the court power to deprive the parent of his authority and yet hold him liable for the maintenance of his child." Whatever may be thought as to how the law should be on this subject, we must take it to be as it is written in the code. It must be presumed that the lawmakers looked at the question from all sides—considering the interest of the child as well as the proper liability of the parent—and concluded to enact the law as it stands. Of course, the court when rendering a judgment of divorce may provide for, and generally does provide for, the maintenance of the children of the parties; and it may afterwards so provide when it appears necessary. We cannot know why there was no such provision in the decree involved here; probably it was because the court knew of the said contract between the parties, and thought that it afforded sufficient guaranty for the maintenance of the children.

Under the foregoing views it is not necessary to consider the ther incidental questions discussed by counsel.

The judgment and order appealed from are reversed.

Lorigan, J., and Henshaw, J., concurred.

[Crim. No. 1147. In Bank.—January 10, 1905.]

THE PEOPLE, Respondent, v. ALEX. J. THOMSON, Appellant.

CRIMINAL LAW—MURDER—SELF-DEFENSE—ACTING UPON APPEARANCES—INSTRUCTIONS—ERROR—INCORRECT PROVISIO—CIRCUMSPECTION—SUDDEN QUARREL—MANSLAUGHTER.—Upon a prosecution for murder, where self-defense was relied upon, and the evidence was such that the claim of self-defense arising out of a sudden quarrel rested largely upon the right of the defendant to act upon appearances, he was entitled to clear and unequivocal instructions upon that subject. It was prejudicial error to refuse a requested instruction which, with an immaterial omission, was a correct exposition of the law upon the subject of appearances, and in its place to give

practically the same instruction, with the incorrect proviso, that "the killing must have been done with due caution and circumspection, and not in a sudden quarrel or heat of passion," else "the defendant is guilty of manslaughter."

Id.—RIGHT OF KILLING IN SELF-DEFENSE.—If the appearances are such as to justify a killing in self-defense, the defendant is not required to exercise any due care or circumspection in the killing; and the killing in self-defense may be justified, notwithstanding it was done in a sudden quarrel, whether the quarrel may arise out of an assault or consist of a mere altercation of words.

Id.—GENERAL INSTRUCTION AS TO DISTRUST OF "WITNESSES"—DISTRUST OF "DYING DECLARATION"—ERRONEOUS REFUSAL OF SPECIAL REQUEST.—A general instruction at the request of the prosecution as to the distrust of any "witness" whose testimony has been admitted, if the jury believed him willfully false in one part of his testimony, would not be construed by the jury to include a "dying declaration" of the deceased, who was not a "witness" on the trial. But the jury are entitled to distrust such declaration, on the same principle upon which a witness would be distrusted, and it was error to refuse a special instruction requested by the defendant that if they believed that the deceased was willfully false in one part of his declaration he should be distrusted in other parts, and that under such circumstances they would be entitled to disregard and cast aside the entire declaration.

Id.—INSTRUCTION AS TO DYING DECLARATION—INVASION OF PROVINCE OF JURY.—An instruction declaring that the dying declaration of the deceased has been received by the court as testimony, and is to be considered by the jury as testimony in the case, invades the province of the jury, who have the right, notwithstanding the preliminary proof, to reject the declaration if they believe it was not made under the sense of impending death.

Id.—INSTRUCTIONS PROPERLY REFUSED.—Argumentative instructions and instructions fairly covered by the charge of the court and an instruction assuming a controverted fact were properly refused.

Id.—EVIDENCE—ADMISSIONS BY DECEASED PRIOR TO AFFRAY.—The court did not err in excluding immaterial evidence offered to show admissions made by deceased prior to the affray, concerning the terms of an agreement between the deceased and the defendant, about which a dispute arose between them. Such evidence was not admissible to contradict declarations of the deceased which were ruled out.

APPEAL from a judgment of the Superior Court of Tulare County and from an order denying a new trial. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

H. C. Lillie, for Appellant.

U. S. Webb, Attorney-General, J. C. Daly, Deputy Attorney-General, and Daniel McFadzean, District Attorney, for Respondent.

ANGELLOTTI, J.—The defendant was convicted of the crime of murder of the second degree, and adjudged to suffer imprisonment for eighteen years. He appeals from such judgment and from an order denying his motion for a new trial.

1. The killing of the deceased by the defendant was admitted, but it was claimed by the defendant that such killing was done in necessary self-defense. The trouble between the parties grew out of a difference as to the price agreed to be paid by the deceased to defendant for the hire of two mules. On the day of the mortal affray the deceased delivered the mules at defendant's residence, and was about leaving, when an altercation commenced as to the amount of money due defendant from the deceased for the hire thereof. There was a quarrel, the evidence tending to show the use of vigorous and profane language by the parties, and the quarrel culminated in the shooting of deceased by defendant. So far as appears, the deceased was not armed. Defendant's claim was that deceased, who was some twelve or fifteen feet from him at the time of the shooting, used such language and made such motions as to indicate that he was about to draw and fire a pistol, and that he believed and was reasonably justified in believing that he was in immediate danger of death, or great bodily harm, at the hands of deceased, and that it was necessary for him to shoot deceased to save himself therefrom.

The defendant was a cripple, having a cork leg. There was much evidence tending to show that the reputation of deceased for peace and quiet was bad, and that this was known to defendant. In fact, the prosecution made no attempt to rebut the evidence introduced by defendant upon this point. It was further shown that the deceased generally carried a pistol, and that this was known to defendant. There was also testimony to the effect that shortly before this time, the deceased, in conversation with defendant, pointed to a man with whom he had previously quarreled, and said, "I horse-

whipped him once; the next man I have any words with I am going to fix him," and that at the time of the shooting, when he made a motion indicating that he was about to draw a weapon, he said to defendant, "You are in for it," or "We are in for it."

There being no evidence to clearly show that the deceased was actually armed at the moment of the difficulty, and consequently that there was actual danger to defendant at the hands of deceased, the defendant's claim of killing in self-defense rested largely, if not entirely, upon his right to act upon appearances. The evidence was of such a nature as to entitle defendant to clear and unequivocal instructions upon this subject. Under these circumstances, the defendant requested the following instruction, viz.: "The defendant was entitled to act upon appearances, and if the language and conduct of the deceased was such as to induce in the mind of a reasonable man, under all the circumstances then existing and viewed from the standpoint of the defendant, that death or great bodily harm was about to be inflicted by deceased upon the defendant, it does not matter if such danger was real, or was only apparent; and if defendant acted in self-defense from real and honest convictions as to the character of the danger, induced by the existence of reasonable circumstances, he should be acquitted, even though he was mistaken as to the extent of the danger."

This requested instruction, except for the omission of the words "or fear" or "a belief" before the words "that death or great bodily harm," which omission is immaterial, was a correct exposition of the law upon the subject of appearances. The court refused to give it as requested, and in its place gave practically the same instruction, with this proviso, viz.: "But the killing must have been done with due caution and circumspection, and not in a sudden quarrel or heat of passion. For if the killing, under such circumstances, was done without due caution and circumspection, or was done in a sudden quarrel or heat of passion, then the defendant is guilty of manslaughter." We cannot understand the object of this addition to the requested instruction, and it certainly does not correctly state the law relative to appearances that will justify a homicide. The effect thereof was not only that the requested instruction was rendered ineffectual, but the

jury were plainly and unequivocally told that the defendant was entitled to act upon appearances, and could be acquitted upon the ground of self-defense where there was, in fact, no actual danger, only in the event that the *killing* was "done with due caution and circumspection and not in a sudden quarrel or heat of passion."

Whatever may be meant by saying that a man must kill another in self-defense "with due caution and circumspection," there is no such limitation upon the right of self-defense. If the appearances are such as to justify a reasonable man in believing that it is necessary to instantly kill another in order to save himself from death or great bodily injury, and he does so believe, he is not required to exercise any "due care" or "circumspection" as to the manner of killing. The words "due caution and circumspection" were undoubtedly taken from our code definition of involuntary manslaughter, which was not, under the evidence, an element in the case. Under section 192 of the Penal Code, where a lawful act which might produce death is done without due caution and circumspection, and the death of another is caused thereby, involuntary manslaughter is committed. Used in connection with and as a limitation upon the right of one acting upon appearances to kill in self-defense, the phrase in question introduced an element not recognized by the law upon that subject.

Nor is it true that a man may not in a sudden quarrel be justified in killing another in self-defense. It is obvious that where a sudden quarrel has commenced, and is in progress between the parties, one of the parties may assail the other under such circumstances as to make it absolutely necessary for the other to kill in self-defense, or, being the aggressor, may so conduct himself as to justify the other as a reasonable man in believing that it is necessary to so do in order to save himself from death or great bodily injury. In either event, the mere fact that the parties are engaged in a sudden quarrel, which may be a mere altercation of words, cannot deprive one of the right to defend himself against the real or apparent assailant. In the case at bar, the parties were admittedly engaged in such a sudden quarrel, and the effect of this instruction was, that the jury were told that the rule as to the right of one to act upon appearances was not applicable to the

case, or, in other words, that the defendant here was not justified in acting upon appearances.

The action of the court in the matter of this instruction constituted error, which we cannot say was without substantial prejudice to defendant's cause. The effect thereof was not obviated by the general abstract instruction given by the court upon the subject of self-defense.

2. The shooting was done on the thirtieth day of December, 1902, and the deceased died on February 8, 1903. On February, 6, 1903, he made what was claimed to be a dying declaration, and this was admitted in evidence as a dying declaration.

It is not claimed that the preliminary evidence as to the circumstances under which the statement was made was not sufficient to warrant the court in admitting the same in evidence, but it is claimed that the trial court erred in giving a certain instruction in regard thereto and in refusing to give others.

This dying declaration was most important to the prosecution. All the eye witnesses of the affray were members of the family of defendant, and their testimony tended to corroborate his statement. It was upon the dying declaration and the location of the fatal wound that the prosecution was compelled to principally rely.

The court (at the request of the prosecution, according to the record) instructed the jury that if they believed that "any witness" whose testimony had been admitted was false in one part of his testimony, then such witness should be distrusted in the other parts of his testimony, and that under such circumstances they might reject and disregard his entire testimony.

It further instructed as follows: "The dying declaration of the deceased, T. B. Slaughter, has been received by the court as testimony and is to be considered by you as testimony in this case. Dying declarations are received by courts as evidence from necessity. There is no authority in law for administering an oath to the person making such declaration. The sense of impending death dispenses with the necessity for an oath." This was the only instruction given regarding the dying declaration.

The court refused to instruct the jury that if they believed that the deceased was willfully false in one part of his declara-

tion, then he should be distrusted in other parts, and that under such circumstances they would be entitled to disregard and cast aside the entire declaration.

We are of the opinion that the instructions given are susceptible of the construction that a dying declaration stands upon a higher plane than that occupied by the testimony of the ordinary witness, and that the testimony of a mere witness may be distrusted and disregarded where a dying declaration may not be so rejected. A person who has made a dying declaration which is admitted on a trial is not a "witness" on the trial, either within the definition of our code (Code Civ. Proc., sec. 1878) or within the common acceptance of the word "witness" and the jury might well have understood that the instruction as to their right to reject and disregard the testimony of "any witness" referred solely to those whose testimony had been received under oath on the trial. Particularly was this so when the separate and distinct instruction was given as to the dying declaration.

It is of course settled law that the credibility or degree of weight which shall be given to a dying declaration is solely a question for the jury, that they may apply the same tests and principles in determining its truth that they apply in the consideration of the evidence of the witnesses, and that if they believe from the evidence that the person making the declaration was willfully false in a material part thereof, they may reject and disregard his entire declaration. We are of the opinion that the court should have made this clear by the instructions. Having given an instruction as to the conditions upon which the jury might reject and disregard the testimony of other witnesses, it should, when requested by defendant, have done at least as much as to the dying declaration, and given the twenty-fifth requested instruction.

We are of the opinion, too, that the one instruction given upon the subject of the dying declaration to some extent invaded the province of the jury. It was practically declared thereby that the declaration admitted was a *dying declaration*,—i. e., that it was made by deceased under a sense of impending death, and that the jury must accept it as having been so made.

It is of course for the court to determine, upon preliminary proof addressed to it, as to whether a declaration made by a

deceased was so made under a sense of impending death, as to be competent evidence, this duty of the court being placed, according to Mr. Greenleaf, "on the same ground with the preliminary proof of documents and of the competency of witnesses" (Greenleaf on Evidence, sec. 161), but the determination by the court that it was so made cannot in the slightest degree impair the power of the jury to determine as to its credibility. As Greenleaf says in the section already cited. "But after the evidence is admitted, its credibility is entirely within the province of the jury, who of course, are at liberty to weigh all the circumstances under which the declarations were made, *including those already proved to the judge*, and to give the testimony only such credit as, upon the whole, they may think it deserves."

Whether the declaration was in fact made under a sense of impending death, is a question that most materially affects the question as to its credibility, and the determination of the court thereon is not conclusive upon the jury. They have the right, in considering whether they shall accept the declaration as a correct statement, to determine for themselves whether the declarant was *in extremis*, and fully convinced of that fact when making the declaration, and are at liberty to disregard it if not satisfied that it was made under a sense of impending death.

This appears to be settled by the great weight of authority. This court, speaking through the chief justice, said in *People v. Amaya*, 134 Cal. 531, that an instruction to the effect that although it was the province of the court to determine in the first instance the admissibility of the dying declaration, the jury were not bound by the fact of its admission to conclude that it was made in view of impending death, etc., but that it was for them to determine whether it was so made, and whether it had been correctly reported, was correct.

In *State v. Reed*, 53 Kan. 767,¹ it was held that an instruction to the effect that such a declaration was made under a sense of impending death, excluded from the jury, in passing on the credibility of the declaration, the question as to whether it was so made, and was erroneous, it being declared that in passing on the credibility of the statement they were entitled to consider whether as a matter of fact deceased had lost all

¹ 42 Am. St. Rep. 322.

hope of recovery at the time he made the same. (See, also, *State v. Phillips*, 118 Iowa, 660, and cases there cited; McClain on Criminal Law, secs. 430, 431; *Starkey v. People*, 17 Ill. 17; *North v. People*, 139 Ill. 81, 102; *State v. Banister*, 35 S. C. 290, 296; *Walker v. State*, 37 Tex. 366, 386; *Commonwealth v. Brewer*, 164 Mass. 577; *State v. Swift*, 57 Conn. 496; 10 Am. & Eng. Ency. of Law, 2d ed., pp. 385, 386.)

Inasmuch as the declaration of the deceased is competent evidence only when made under the sense of impending death, and because it was so made, it would seem to logically follow that the jury should give it no consideration whatever, unless they are satisfied that it was made by the deceased under such sense of impending death. It is a rule of evidence that such a declaration can be considered only in that event, and while the court must of necessity preliminarily determine the question of fact essential to the admission of the declaration in evidence, the rule of evidence still remains for the guidance of the jury, and as the jury must exercise their power of judging of the effect of the evidence in subordination to the rules of evidence, it would seem to be proper to inform the jury of such rule and of their duties in regard thereto. The doctrine in such matters is stated in *Commonwealth v. Brewer*, 164 Mass. 577, as follows: "When the admissibility of evidence depends upon a collateral fact, the regular course is for the judge to pass upon the fact in the first instance, and then, if he admits the evidence, to instruct the jury to exclude it if they should be of different opinion on the preliminary matter." (See, also, *Jones v. State*, 71 Ind. 66.) The case is analogous to that where it is sought to introduce a confession of a defendant in evidence, and the court is called upon to preliminarily pass upon the question of fact as to whether the confession was freely and voluntarily made. (*State v. Banister*, 35 S. C. 290.) In such a case, it is for the jury to ultimately determine whether it was so made, and therefore entitled to consideration. (*People v. Oliveria*, 127 Cal. 376, 381.)

Upon a retrial proper instructions along the lines discussed will doubtless be given. Many of the instructions requested upon this branch of the case were objectionable, some of them being purely argumentative, and were properly refused.

3. Except upon the question as to the right of the defendant

to act upon appearances, which has already been noticed, the instructions upon the law of self-defense fairly covered the case, and included substantially all such portion of defendant's requested instructions upon the subject as he was entitled to. Defendant's requested instructions as to the object of the evidence offered to show the bad reputation of the deceased for peace and quiet were objectionable, in assuming that defendant believed that it was necessary to kill in self-defense. Doubtless if proper instructions upon this subject are asked they will be given.

4. In all other respects defendant's requested instructions, so far as proper, were fairly covered by the charge of the court.

5. We are of the opinion that the court did not err in excluding the evidence offered to show certain admissions made by deceased prior to the affray, concerning the terms of the agreement between himself and defendant as to the mules. There was nothing therein tending in the slightest degree to show the mental attitude of the parties toward each other at the time of the affray—nothing at all material to the question as to who was the aggressor therein. *People v. Hecker*, 109 Cal. 451, is clearly inapplicable.

The argument that the evidence tended to contradict certain matters improperly contained in the alleged dying declaration of deceased is overcome by the fact that the court ruled such matters out in admitting the declaration, and that the same were finally read in evidence only because the defendant insisted thereon. We are unable to perceive that the district attorney was guilty of any misconduct in argument that could have prejudicially affected defendant's cause.

This disposes of all the points discussed in the briefs.

For the reasons given the judgment and order are reversed and the cause remanded for further proceedings.

Shaw, J., McFarland, J., Van Dyke, J., Henshaw, J., and Lorigan, J., concurred.

[Crim. No. 1184. Department One.—January 11, 1905.]

THE PEOPLE, Respondent, v. CHARLES CLARK, Appellant.

CRIMINAL LAW—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—DIRECT EVIDENCE.—Where there was direct evidence that the defendant committed the crime charged, the court properly refused a requested instruction assuming that the case was one of circumstantial evidence.

ID.—HYPOTHESIS OF INNOCENCE—REASONABLE DOUBT.—The jury were properly instructed that in considering the evidence, if they could reasonably account for any fact in the case upon a theory or hypothesis which will admit of defendant's innocence, it was their duty to do so, and if they have a reasonable doubt of his guilt, they should acquit the defendant. The court properly refused an instruction that the jury might reject any theory or supposition on which the evidence might point to defendant's guilt, "even though such theory may be more reasonable and much more probable than the one which admits of his innocence."

ID.—GRAND LARCENY—JOINT CHARGE—INSTRUCTION PROPERLY REFUSED.—Where defendant and another were jointly charged with grand larceny, and the evidence tended to show that the larceny was the result of their joint efforts, it was proper to refuse a requested instruction to the effect that unless the jury were satisfied beyond a reasonable doubt that the defendant, and not some one else, took and carried away the money from the person of the prosecuting witness, as alleged in the information, they could not find the defendant guilty. Such instruction would mislead the jury.

ID.—INSTRUCTION AS TO ACQUITTAL—PHASE OF EVIDENCE.—A requested instruction stating in effect that a verdict of acquittal should be rendered on a certain phase of the evidence, regardless of whatever else might be developed in the case, was properly refused.

ID.—GRAND LARCENY INCLUDED IN ROBBERY—DISTINCTION—REFUSAL OF REQUEST NOT PREJUDICIAL.—Robbery includes grand larceny, and, under a charge of grand larceny, the defendant could not be acquitted though the evidence shows robbery; and he could not be prejudiced by the refusal of a requested instruction distinguishing between grand larceny and robbery.

ID.—PETIT LARCENY—OMISSION OF FORM OF VERDICT.—The defendant cannot complain of the omission to give the jury a form of verdict permitting them to find him guilty of petit larceny where he did not request an instruction that he might be so convicted, and where it appears that he was guilty of grand larceny from the person if he was guilty of anything. The natural presumption is, that the jury, unless satisfied beyond a reasonable doubt of the offense

of grand larceny, would perform their duty and acquit him altogether.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. B. N. Smith, Judge.

The facts are stated in the opinion.

Emmet H. Wilson, for Appellant.

U. S. Webb, Attorney-General, and J. C. Daly, Deputy Attorney-General, for Respondent.

GRAY, C.—Defendant was convicted of grand larceny, and appeals from the judgment and from an order denying him a new trial.

1. He complains of the refusal of the court to give one of his requested instructions, commencing as follows: "In order to convict the defendant on circumstantial evidence it is necessary," etc. This instruction assumes that a conviction, if had, must necessarily be based on circumstantial evidence. At the same time appellant concedes in his brief that there was direct evidence that defendant committed the crime charged, in the testimony of the complaining witness, Caler. Therefore, this cannot properly be called a case of circumstantial evidence, and the court rightly refused an instruction assuming that it was such a case. (*People v. Lonnen*, 139 Cal. 634; *People v. Burns*, 121 Cal. 529.)

2. That part of requested instruction No. 4, which was to the effect that the jury might reject any theory or supposition on which the evidence might point to defendant's guilt, "even though such theory may be reasonable and much more probable than the one which admits of his innocence," was properly refused and stricken out. The instruction on that subject given to the jury reads as follows: "In considering the evidence if you can reasonably account for any fact in this case upon a theory or hypothesis which will admit of the defendant's innocence, it is your duty under the law to do so, and if you have a reasonable doubt of his guilt, you should acquit him." This was a proper instruction on the subject, and as full and favorable to defendant as he could reasonably ask.

3. The court refused the request of defendant to instruct as follows: "Unless there is evidence in this case to justify the conclusion beyond a reasonable doubt that the defendant and not some one else took and carried away the money from the person of the prosecuting witness, as alleged in the information, you cannot find the defendant guilty." This instruction was properly refused for the reason that the information charged the defendant and one Perry jointly with the crime in question, and the evidence tended to show that the larceny was the result of their joint efforts. It would mislead the jury in such a case, and it would be improper to tell them in effect that they could not find the defendant guilty unless they were satisfied that he committed the crime alone. The refused instruction might be understood as above indicated, and was therefore properly refused.

4. Requested instruction No. 9 was properly refused because it stated in effect that a verdict of acquittal should be rendered on a certain phase of the evidence regardless of whatever else might be developed in the case.

5. The defendant was in no way injured by the refusal of the court to give the requested instruction distinguishing between grand larceny and robbery. The defendant was charged with larceny from the person, and was not charged with robbery. He could not be acquitted of larceny if the jury were satisfied beyond a reasonable doubt that the facts showed him guilty of robbery, because "it is settled law that robbery involves grand larceny." (*People v. Church*, 116 Cal. 303.) "Robbery is larceny, with the element of force or intimidation added." (*People v. Clary*, 72 Cal. 61.) The doctrine is well settled that a defendant cannot complain because the information and the instructions of the court confine his conviction to the lesser crime included within what the evidence might otherwise warrant the jury in finding to be a greater crime. (*People v. Muhlner*, 115 Cal. 303; *People v. Clary*, 72 Cal. 61.) It would have been a vain thing for the court to define robbery and state its various elements in a case where the information would not admit of a conviction of robbery. The court did very distinctly and plainly give to the jury the elements of grand larceny, and that was all that was necessary in a distinctly grand larceny case.

6. The defendant complains that the court failed to give

the jury a form of verdict permitting them to find him guilty of petit larceny. There is no reasonable ground upon which a defendant can be heard to complain that the action of the trial court has prevented his conviction of any particular crime, either great or small. His plea of not guilty shows that he does not desire to be convicted of anything embraced in the information. It will not be presumed for a moment that the jury will do so base a thing as to convict of the higher offense because they are not permitted to convict him of the lesser; but, on the contrary, the natural presumption is, that unless they are satisfied beyond a reasonable doubt of his guilt of the higher offense they will perform their duty and acquit him altogether, even though they be satisfied that he is guilty of the lesser offense. "The error, then, if any was committed, was favorable to defendant, and the case should not be reversed on account of it." (*People v. Lopez*, 135 Cal. 25.) Besides, defendant did not request an instruction that he might be convicted of petit larceny, and, further, was guilty of larceny from the person, or grand larceny, if he was guilty of anything. (*People v. Bailey*, 142 Cal. 434; *People v. Keith*, 141 Cal. 690.)

7. There is no merit in the contention that the evidence fails to support the verdict.

The judgment and order should be affirmed.

Cooper, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Van Dyke, J., Angellotti, J., Shaw, J.

[L. A. Nos. 1640, 1641. Department Two.—January 11, 1905.]

SOLEDAD GUTIERREZ et al., Appellants and Respondents,
v. HENRY WEGE, Respondent and Appellant.

WATER-RIGHTS—QUIETING TITLE—USE BY RIPARIAN OWNER—FINDING AGAINST EVIDENCE.—In an action to quiet title to waters of a creek having rise in a spring on the land of the defendant and flowing into the land of plaintiff, evidence which goes no farther than to show that the defendant had been making such reasonable use of

the water for domestic purposes and for irrigation as he was entitled to as a riparian owner is inconsistent with a finding that for more than six years the defendant had adversely diverted and used all the waters of the spring and creek.

Id.—ADVERSE USE—PRESCRIPTIVE RIGHT.—A use of the water strictly within the legal rights of a riparian owner, and with which no other person has a right to interfere, cannot be called an adverse use for the purpose of conferring a property right or ownership in the water under the statute of limitations.

Id.—RIGHTS OF RIPARIAN OWNER.—The water of a riparian stream is parcel of the land; and one riparian owner as against a lower one is entitled only to a reasonable use of the water upon his land, with no power to convey it elsewhere to the detriment of the lower riparian proprietor. If he should acquire rights by user, he does not become the absolute owner, and his rights would be limited by the extent of the user.

Id.—INCREASED FLOW FROM SPRING.—It may be that if the first riparian proprietor had increased the flow by digging out the spring on his land, he would be entitled to a greater portion of the stream on a fair division of it; but such increased flow would not entitle him to all of the waters naturally flowing from the spring into the creek.

Id.—OBSTRUCTION OF STREAM—INJUNCTION.—It is not consistent with the law of riparian rights to enjoin a riparian owner from obstructing in any wise the riparian stream. Some obstruction of it is necessary in order to make any use of the water for irrigation or for domestic or house use. There are some circumstances under which the upper proprietor may properly divert and consume the entire stream, for a time at least, without actionable wrong.

Id.—DECREE TO FIT STREAM—ALTERNATE USE.—The decree settling water-rights as between riparian proprietors should be made to fit the stream it applies to; but where the stream is small the parties, as a general rule, can best be served by giving them the alternate use of the entire stream.

Id.—COSTS—DISCRETION OF COURT.—In an action to quiet title to a riparian stream a part of the decree, that neither party recover costs, is within the equitable discretion of the trial court.

CROSS APPEALS from a judgment of the Superior Court of Ventura County. Felix W. Ewing, Judge.

The facts are stated in the opinion.

G. H. Gould, and W. R. Edwards, for Soledad Gutierrez et al., Appellants and Respondents.

H. L. Poplin, for Henry Wege, Respondent and Appellant.

GRAY, C.—This action is brought to quiet title to the waters of Casitas Creek, a small stream having its rise in a spring on the land of defendant and flowing for some distance into the adjoining land of plaintiffs. The judgment in the cases is as follows:—

“1st. That the defendant owns and is entitled to the sole and exclusive use of all the waters flowing from that certain spring situate upon the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 29, described in defendant’s amended answer, and to all waters flowing in said Casitas Creek above the reservoir situated near the south line of said land and in the bed of said creek;

“2d. That of the waters arising and flowing in said creek below said reservoir, the plaintiffs as riparian owners are entitled to 40/41 thereof, and the defendant as riparian owner is entitled to the remainder;

“3d. That the defendant and his agents and employees are perpetually restrained and enjoined from hereafter obstructing or polluting, in any wise, the said Casitas Creek below said reservoir; and

“4th. That neither party recover his costs or disbursements in this action.”

There are two appeals before us from this judgment; the plaintiffs appeal from the first paragraph thereof, and defendant appeals from the second, third, and fourth paragraphs.

We are of opinion that the first paragraph of the judgment, wherein it is decreed that the defendant “owns and is entitled to the sole and exclusive use of all the waters,” etc., is not warranted by the evidence taken at the trial.

Something upwards of five years before the commencement of the action defendant had constructed a reservoir on his land in the channel of the creek in question through which ran the waters from the spring. From this reservoir he had constructed small ditches on each side of the creek through which he conveyed water for the purpose of irrigating a few acres of his land, not more than four or five acres at the outside. Defendant had also dug out the spring and developed more water than naturally flowed from it. He had also laid pipes from the spring to his house, and by that means conducted water thereto for domestic use. He had also been accustomed to water horses and cattle at the creek below the reservoir,

and, perhaps, above it. The evidence, however, failed to show that he had used all the water flowing in the spring and stream above the reservoir at all times for a period of five years prior to the commencement of the action. The defendant himself testified that "there was water sometimes that I did not use at all during the months of August and September." The defendant's wife testified, in speaking of her husband's use of the water: "He only used the water two different periods of the year; when he is not using it for irrigation it runs in the creek."

The foregoing evidence is undisputed, and is inconsistent with the finding of the court to the effect that for more than six years the defendant had adversely diverted and used all the waters of the spring and creek above the reservoir. Indeed, the evidence goes no farther than to show that the defendant had been making such reasonable use of the water for domestic purposes and for irrigation as he was entitled to do by reason of his being a riparian proprietor. The riparian owner, so long as his use of the water is within his rights as such riparian owner, gets no right or interest in the water additional to his riparian interest, even though such use extend for a period beyond five years. A use of the water strictly within his legal rights, and with which no other person has a right to interfere, cannot be called an adverse use for the purpose of conferring a property right or ownership in the water, under the statute of limitations. It is clear, then, that the defendant was not the owner of the water by adverse use. It is also plain that he was not the "owner" nor entitled to the "exclusive use" of the water by virtue of being a riparian proprietor. As such riparian owner the water was parcel of the land, and he as against other riparian owners was entitled only to a reasonable use of the water upon the riparian lands, with no power to convey it elsewhere to the detriment of the riparian owner below him on the stream. Even if we were to admit that the defendant had acquired a right as against the lower riparian proprietor by adverse use, still that right would be measured by the use that the water had been put to, and the defendant here would still not be the absolute owner of the water, to do with it as he pleased, nor would he be entitled to the use of it to any greater extent than he had already used it. This is illustrated in the recent

case of *Southern California Investment Co. v. Wilshire*, 144 Cal. 68.

Nor can it be said that the defendant owns "all the waters" flowing above the reservoir by reason of the fact that the waters of the spring percolated in the soil and the flow therefrom had been increased by digging out the spring.

It must be admitted from the record that before the defendant worked upon this spring at all the waters found their way, in some measure at least, from the spring to the channel of the creek and flowed down the latter to plaintiff's land. It may be that the fact that the defendant as a riparian proprietor had worked upon the spring and increased its flow would entitle him to a greater portion of the water on a fair division of the same than would otherwise fall to his lot. But he certainly did not by increasing the flow become the owner of all the flow. Nor was he the owner in any sense except as a riparian proprietor of any water which naturally found its way from the spring to the creek. And this is so whether the water percolated directly into the creek through the soil or reached the creek in one or more running streams. The spring supplying the stream was itself a part of the stream, and the defendant had the same right in the spring and no greater right therein than he had in the stream below. He had no different or better right to cut off the water in the spring or above the spring than he had to cut it off or divert it from the stream. Any interference with the supply of the stream was an interference with the lower riparian owner's right to have the water continue to run in the stream to his land. The defendant was entitled only to a reasonable use of the waters of all parts of the stream including the spring; the part of the judgment complained of gives him more than this and is wrong.

The appeal of the defendant is also well founded, at least in part. It is not consistent with the law of riparian rights in this state to enjoin a riparian owner from "obstructing in any wise" the riparian stream. It is necessary that he should "obstruct" it, in some measure at least, in order to make any use of the water either for irrigation or for domestic or house use. At certain stages of so small a stream as this, even the watering of a few cattle might consume the entire stream and thus obstruct and prevent the flow thereof down to plaintiff's

land. It has been said by this court that an upper riparian owner cannot consume the entire stream to the detriment of a lower landowner on such stream. And this as a general rule is undoubtedly correct, but it has its limitations. When the flowing stream, if all allowed to remain in the channel, will not reach the lands of the lower proprietor, the lower proprietor cannot be justly called a riparian proprietor at all. There is no stream of water flowing or that would flow through his land if left unobstructed. Hence he cannot be injured and cannot be heard to complain if the proprietor above him diverts or consumes all the water that he finds running on his own land.

Again, a stream running through two pieces of land might be of such a character that if the upper riparian owner made any use of it at all it would be rendered useless to the owner lower down on the stream; under such circumstances we do not think that the upper owner should be deprived of *all use* that the lower owner or owners may have *some use* of it. We think it should be conceded that there are some circumstances under which the upper riparian proprietor may divert and consume the entire stream for a time at least, without committing any actionable wrong against the lower proprietors.

In this class of cases the decree of the court should be made to fit the stream that it applies to, and as a general rule when the stream is small the parties can best be served by giving them the alternate use of the entire stream. The stream in this case was less than two miner's inches on the land of plaintiff by actual measurement when all the water from every source was flowing into it. The evidence shows that during the irrigation seasons or periods the defendant had been accustomed to take and use all the water flowing down to his reservoir in the stream, and that he had been doing this for a period of upwards of five years. Of course, he is entitled to continue this use. It is impossible, however, to frame a decree on the evidence before us, as it does not show the extent or duration of these periods of irrigation, when they begin, and when they end. The stream in this case, together with the various springs supplying it, should have been treated as a unit, instead of being divided into the waters above and the waters below defendant's reservoir. An equitable division of the entire water between the parties is the only practical solu-

tion of the case. The evidence in the case, however, is so uncertain and incomplete that no decree of practical benefit to the parties can be based upon it.

The part of the decree that neither party recover costs was a matter within the equitable discretion of the trial court. (Code Civ. Proc., sec. 1025; *Abram v. Stuart*, 96 Cal. 235.) But inasmuch as the case must go back for another trial it is unnecessary for us to determine here whether the discretion was properly exercised.

We advise that the entire judgment be reversed.

Cooper, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the entire judgment is reversed.

Van Dyke, J., Shaw, J., Angellotti, J.

Hearing in Bank denied.

[Crim. No. 1133. In Bank.—January 12, 1905.]

THE PEOPLE, Respondent, v. M. T. WARD, Appellant.

CRIMINAL LAW—OBTAINING MONEY BY FALSE PRETENSES—SUFFICIENCY OF EVIDENCE, HOW REVIEWED—APPEAL FROM JUDGMENT AND ORDER DENYING NEW TRIAL.—Conceding, without deciding, that the sufficiency of the evidence to support a verdict of guilty of obtaining money by false pretenses cannot be reviewed upon appeal from the order refusing a new trial, for want of including the grounds of the motion in the bill of exceptions, yet where the defendant moved the court, when the prosecution rested, to instruct the jury to acquit, and excepted to the ruling denying the motion, the ruling involved the whole merits of the case, and necessarily affected the judgment, and the sufficiency of the evidence for the prosecution may be reviewed upon the appeal from the judgment, upon the bill of exceptions in relation to such ruling.

ID.—CORPUS DELICTI—ELEMENTS OF CRIME.—The elements of the crime of obtaining money by false pretenses necessary to establish the *corpus delicti* are false statements adapted to the fraudulent purpose and money parted with upon the faith of such statements.

ID.—CORPUS DELICTI, HOW PROVED—ADMISSIONS OF DEFENDANT INSUFFICIENT.—The *corpus delicti* must be proved by evidence independent of the extrajudicial confessions or admissions of the defendant.

Where there was no substantial evidence of the falsity of the statements alleged to have been made by the defendant aside from the testimony of witnesses as to his admissions, it was the duty of the court to advise the jury to acquit the defendant.

LD.—DUTY TO “ADVISE” JURY—REQUEST TO “INSTRUCT.”—Where the case is such that under the statute it is the duty of the court to “advise” the jury to acquit for want of evidence of the *corpus delicti*, absolutely required by law to sustain a conviction, the fact that counsel moving orally at the close of the people’s case used the word “instruct” instead of “advise” does not justify a denial of the motion, which would sacrifice substantial justice to a mere form. The court under such motion should “advise” an acquittal.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

Emmet H. Wilson, for Appellant.

U. S. Webb, Attorney-General, and J. C. Daly, Deputy Attorney-General, for Respondent.

BEATTY, C. J.—The defendant was convicted on a charge of obtaining money by false pretenses (Pen. Code, sec. 532), and appeals from the judgment as well as from the order denying his motion for a new trial. In support of his appeal from the order he makes the point that the evidence in the record is not sufficient to sustain the conviction. This is practically conceded by the attorney-general, but he objects to any consideration of the point because the record does not disclose the grounds of the motion, and therefore we cannot know that it was based either wholly or in part upon the alleged insufficiency of the evidence.

The motion which was filed by the defendant is not included in the bill of exceptions, but it seems that the clerk in entering the order denying a new trial inserted in his minutes, and in immediate connection with the order, a full copy of the motion, and it is certified to us in that form; that is to say, as a part of the minutes of the proceedings upon the motion. The contention seems to be, that since it is not the duty of the clerk to record anything but the order, his statement of the grounds of

the motion must be disregarded, and that under rule XXIX of this court they can never be considered, except when set out in a bill of exceptions. It is doubtful whether this rule applies. It has been held not to apply to the order appealed from, or to anything appearing on the face of the record of the order. (*Miller v. Lux*, 100 Cal. 612.) But probably the statute does; at least we are not prepared to say that a defendant in a criminal cause seeking a review of an order denying him a new trial on the ground that the verdict is unsupported by the evidence can be excused from showing by his bill of exceptions that he moved on that ground. For unless that is one of the grounds of his motion, and shown to be so by his bill of exceptions, the attention of the court and of the district attorney is not called to the necessity of setting out the evidence by amendment where material evidence has been omitted from the bill as proposed, and this court under such circumstances might feel constrained to presume that there was other evidence introduced at the trial sufficient to cover any deficiencies apparent in the record.

These questions, however, do not require to be decided in the present case, for conceding that the evidence cannot be reviewed on the appeal from the order, the question of its sufficiency to sustain the verdict is presented by the appeal from the judgment.

When the prosecution rested, the defendant moved the court to instruct the jury to acquit. The motion was denied and the defendant excepted. This ruling clearly involved the whole merits of the case, and necessarily affected the judgment. It is therefore reviewable on appeal from the judgment (Pen. Code, sec. 1259), and was the subject of an exception under subdivision 3 of section 1170 of the Penal Code. It was also an exception which equally with a motion for a new trial on the ground of insufficiency of the evidence gave notice to the judge and the district attorney that if there was competent evidence to sustain the charge they must see to it that the bill of exceptions as settled shows the fact. We are therefore justified in assuming in this case that if the evidence in the record fails to support the verdict, then the evidence adduced at the trial was equally deficient.

The charge was obtaining money by false pretenses. The elements of this crime necessary to the establishment of the

corpus delicti are false statements adapted to the fraudulent purpose, and money parted with upon the faith of such statements. As in other cases, the *corpus delicti* must be proved by evidence independent of the extrajudicial confessions or admissions of the defendant. (*People v. Simonsen*, 107 Cal. 345.) In this case there was no substantial evidence of the falsity of the statements alleged to have been made by the defendant aside from the testimony of witnesses as to his admissions. And this made it the duty of the court, upon request of defendant, to *advise* the jury to acquit. It is true that in making his motion he used the word "instruct" instead of "advise," and it was held by this court in the case of *People v. Daniels*, 105 Cal. 266, not to have been an error to refuse an instruction in writing, similarly worded, because section 1118 of the Penal Code only authorizes the judge to advise the jury to acquit when he deems the evidence insufficient to warrant a conviction. The distinction between the right of the judge to *advise* a verdict of acquittal, and the power to *compel* a verdict is of course an important one in some aspects of the question, and was important in the case of the *People v. Horn*, 70 Cal. 18, which was cited as authority in the case of *People v. Daniels*. But if the case is such that it is the duty of the court to advise an acquittal upon the ground that there is no evidence of the *corpus delicti* of a character absolutely required by the law to sustain a conviction, the fact that counsel moving orally at the close of the people's case uses the word "instruct" instead of "advise" does not justify a denial of the motion. To say that it does is to sacrifice substantial justice to a mere form. In *People v. Jones*, 31 Cal. 571,—a well-considered decision frequently cited in later cases and never disapproved,—it was held that in such a case the court should *instruct* the jury that the *corpus delicti* was not proved. This case was not cited or referred to in *People v. Daniels*, though much more directly in point than *People v. Horn*, where the question under consideration was the effect of a former acquittal by a jury that had been *instructed* to acquit.

In *People v. Lewis*, 124 Cal. 553, Justice Temple, in a case of conflicting evidence, and where the evidence was amply sufficient to sustain the conviction, expressed the opinion that the refusal of the judge to advise an acquittal was not the

subject of an exception; but that statement was not necessary to his conclusion and was not the ground of decision. We approve the doctrine of *People v. Jones*, 31 Cal. 571, that when there is a clear failure of proof upon a material allegation of the charge the defendant has a right to demand an instruction to the jury that there has been such failure of proof, and the fact that he moves for an instruction to *acquit* does not relieve the court of the duty of doing what the court in such case may do,—i. e., *advise* an acquittal.

The judgment is reversed and cause remanded.

Lorigan, J., and Henshaw, J., concurred.

Angellotti, J., McFarland, J., and Van Dyke, J., concurred in the judgment.

SHAW, J., dissenting.—I dissent. I think the judgment should be affirmed, for the reason that under the decisions in *People v. Daniels*, 105 Cal. 266, and *People v. Lewis*, 124 Cal. 553, the record presents no question for review by this court.

[S. F. No. 3820. In Bank.—January 13, 1905.]

R. II. ELDER, Respondent, v. JOHN E. McDOUGALD, Treasurer of the City and County of San Francisco, Appellant.

PRELIMINARY EXAMINATION BY POLICE JUDGE—SOURCE OF POWER—SAN FRANCISCO CHARTER—PENAL CODE.—The charter of the city and county of San Francisco only confers upon the police court, as such, the power to conduct preliminary examinations in cases of felony and no such power could be conferred upon the police judge by the charter, under the grant of power by the constitution to create police courts. Nevertheless, the police court having been established, a judge thereof has power to hold a preliminary examination as a committing magistrate under the general provisions of section 808 of the Penal Code.

ID.—POWER TO APPOINT STENOGRAPHIC REPORTER—CONSTITUTIONAL LAW —PROVISIONS OF CHARTER—CODE PROVISIONS SUPERSEDED.—Under section 8½ of article XI of the constitution, placing police courts under charter control, and authorizing the charter to fix the compensation of attachés the power given by the charter of the city

and county of San Francisco to the police judges to appoint not more than two stenographic reporters, and fixing their compensation and duties, including the taking of notes of all preliminary examinations, is exclusive, and supersedes the provisions of section 869 of the Penal Code, so that a police judge acting as a committing magistrate has no power under that section to appoint another stenographic reporter, and to fix his compensation as a charge upon the municipal treasury.

10.—“ATTACHÉS” OF POLICE COURT—STENOGRAPHERS.—The stenographers appointed by the police judges under the charter are “attachés” of the police court within the meaning of section 8½ of article XI of the constitution.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. M. C. Sloss, Judge.

The facts are stated in the opinion of the court.

Percy V. Long, City Attorney, and John P. Coghlan, Assistant City Attorney, for Appellant.

George D. Collins, for Respondent.

LORIGAN, J.—A *mandamus* proceeding was brought to compel defendant, as treasurer of the city and county of San Francisco, to pay a claim of plaintiff for services rendered as stenographic reporter in reporting the testimony and proceedings before a judge of the police court of the city and county of San Francisco, at the preliminary examination held therein, of one R. A. Fitzgerald, charged with murder. The superior court sustained the demurrer to the answer of defendant, and ordered a peremptory writ to issue, requiring payment as prayed for by plaintiff, and defendant appeals.

There is no dispute as to the fact of the appointment of plaintiff and the rendition of the services; it relates to the validity of the appointment itself.

The plaintiff was appointed by a judge of the police court, created under the charter of the city and county of San Francisco, before whom the preliminary examination was being held, and the appointment was made under section 869 of the Penal Code, which it is claimed conferred power upon him to do so. It is insisted by the appellant, however, that the judge had no authority to make the appointment under this section, but that the charter of the city and county of San Francisco,

which provides for the appointment of two stenographers by the judges of the police court to take notes at all preliminary examinations and fixes their compensation (of which plaintiff was not one), furnishes the only authority in the matter of employment of stenographers in taking preliminary examinations in that court, and that his appointment under the section of the Penal Code was void. Hence, the question is narrowed down to an inquiry as to whether the provision of the Penal Code, or that of the charter, controls the judges of the police court of the city and county of San Francisco, in appointing stenographers to report preliminary examinations in felony cases held before them.

The constitution (section 8½ of article XI) authorizes and empowers the creation of police courts, and places such courts under charter control by providing that "it shall be competent, in all charters framed under the authority given by section 8 of article XI of this constitution, to provide, in addition to those provisions allowable by this constitution and by the laws of the state, as follows:—

"1. For the constitution, regulation, government, and jurisdiction of police courts, and for the manner in which, the times at which, and the terms for which the judges of such courts shall be elected or appointed, and for the compensation of said judges and of their clerks and attachés."

Under this constitutional provision a charter for said city and county was regularly adopted, wherein a police court to be known as the police court for the city and county of San Francisco was created and established, consisting of four judges, one each for the several departments into which the court was divided.

As to jurisdiction, it was provided that "the police court of the city and county of San Francisco shall have:—

"First—Exclusive jurisdiction of all prosecutions for the violation of ordinances of the board of supervisors.

"Second—Concurrent jurisdiction with the superior court of all misdemeanors and of the examination of all felonies committed in the city and county.

"Third—Said court, or any judge thereof, shall have the same powers in all criminal actions, cases, examinations and proceedings as are now or may hereafter be conferred by law upon justices of the peace."

This is followed by provisions for the appointment of officers of the court, and then we reach the section particularly under consideration here, relative to the appointment of stenographers, which is as follows: "The police judges may appoint not more than two competent stenographers, who shall attend the sessions of the court, and take notes of all preliminary examinations made at the sessions, and transcribe into typewritten longhand all evidence taken by either of them where the parties charged have been held for trial, and deliver one copy of the same to the clerk and one copy to the district attorney. Each of such stenographers shall be paid for all his services, including transcription and all stationery used by him, an annual salary of twenty-four hundred dollars."

This is a sufficient statement of the charter provisions under which to examine the points involved.

It is quite clear that the adopted charter, in as far as it undertakes to confer jurisdiction to hold preliminary examinations for felonies, confers it solely upon the police court of such city and county, to be exercised as a court. No jurisdiction is conferred under that instrument upon the *judges* of such court to hold them, nor could such jurisdiction be conferred upon them under the constitutional provision which authorizes only the creation of police *courts*. Nor was it necessary to confer any such jurisdiction by the charter. The charter having created the police court, by that very creation any *judge* thereof, *ipso facto*, became vested with jurisdiction to conduct such examinations under the general law of the state as a magistrate. (*People v. Crespi*, 115 Cal. 54; *People v. Coken*, 118 Cal. 78.)

That law (Pen. Code, sec. 808) provides that among others invested with such jurisdiction shall be included "police magistrates in towns or cities," and, as incident to their jurisdiction as such magistrates, further provides that they shall have the power to appoint a reporter to take notes of the preliminary examination and to fix his compensation, which shall be paid out of the treasury of the city, or city and county, in which such examination is conducted. (Pen. Code, sec. 869.)

The record in this case shows that the preliminary examination at which the respondent assisted was not conducted by

the police court of said city and county, acting as a *court*, but by one of the *judges* thereof acting as a committing magistrate under the provision of the general law above cited, and it is insisted that the constitutional provision above quoted did not authorize the framers of the adopted charter to control his power to appoint or fix the compensation of a stenographer, when acting as such magistrate.

It must, of course, be conceded that this contention of respondent is correct, unless the constitutional provision did confer such power, even when the *judge* of the police court, by virtue of his office as such, was acting as a magistrate, and whether it did or not is the only point in the case.

It is to be borne in mind that the power conferred upon the framers of municipal charters to legislate concerning police courts, as to the "constitution, regulation, government, and jurisdiction" of such courts, and with reference to the clerks and attachés thereof, proceeds directly from the people, expressed under a constitutional provision. Prior to this it was not competent to make any provision by framers of municipal charters for such courts. That power could only be exercised by the legislature. (*People v. Toal*, 85 Cal. 335.)

It was expressly to confer this authority to so legislate that the amendment to the constitution (section 8½ of article XI) was adopted by the people: to authorize their creation not only for municipal purposes—the prosecution for violation of municipal ordinances—but as agencies of the state to assist, to a certain extent at least, in the enforcement of its general criminal laws. As these courts were to be supported and sustained by the municipalities creating them as part of the municipal government, and from the municipal funds, it was intended under the broad provision of the constitution conferring power to "constitute, organize, and govern" them, that the charter might provide for the appointment and compensation of all persons who might, in a general sense, and in view of the jurisdiction with which such courts might be clothed, be deemed necessary to a full and efficient exercise of such jurisdiction.

And while it is contended on this appeal that it was not competent under this constitutional grant of power for the charter framers to invest such police courts with jurisdiction to enforce the general laws of the state to the extent of hold-

ing preliminary examinations, we do not feel called on to determine that question. It is not at all involved in the present inquiry.

If the court could not be invested with such jurisdiction, it could certainly be invested with jurisdiction for other purposes, and there is no doubt that it was competent to provide in the charter for such stenographic reporters as might be deemed necessary for the general purposes of such courts. These reporters are recognized by our laws as proper, and sometimes indispensable, adjuncts to a court, to enable it to properly and efficiently discharge its duties.

But whatever the power conferred under the constitutional provision may be relative to the right of the charter framers to provide for reporters as necessary to the full and efficient equipment of the police court, as a court, it is contended that there is no authority conferred by the constitution upon the charter framers to provide for such reporters to the *judge* of said court acting as a committing magistrate in conducting such examination under jurisdiction conferred by the general law and not under the charter. We are, however, of an opposite opinion, and think that a fair construction of the constitutional provision not only authorized the framers of the adopted charter to legislate as to the necessary attachés of the police court itself, but also as to those whose attendance upon the judge of the court might be necessary to the exercise of any jurisdiction with which he was invested—whether that jurisdiction was derived from the charter itself, or was conferred upon him under the general laws, by virtue of his existence as a police judge under the charter. The constitutional amendment was framed and adopted with a knowledge of the then existing legislation relative to police courts and their duties, and of the jurisdiction conferred upon the latter under the general law, from their existence as such police judges. And while authorizing the chartered municipalities to provide for the compensation of the attachés of the court itself, it had in view also the fact that (specially in a merged and consolidated municipal government, like that of the city and county of San Francisco) a large jurisdiction might be exercised by the judges of such courts under the general law, in conducting preliminary examinations, and that in exercising that jurisdiction there would necessarily be incurred ex-

penses to be borne by the municipal treasury, and it was intended that as to any attaché of the judge—as well as of the court—the municipal government should have the right to provide not only for the compensation of the judges, but for “their clerks and attachés.” It is insisted, however, that no such authority is given in the constitutional provision for the appointment of attachés to the judge of the police court; that it only provides for fixing their compensation; and that in any event a reporter appointed by a police judge to take notes of the preliminary examination held by him as a magistrate cannot be considered an attaché of such judge under the charter.

As to the power of appointment, we think that from the context of the provision of the constitution it is apparent that such power was conferred. The right to “constitute, regulate, and govern police courts” would be sufficient warrant for the appointment of all persons necessary to its complete and efficient organization, and that the relation of the term “their clerks and attachés” to the general context of the provision authorized not only the fixing of the compensation of such attachés, but of their appointment to the judges of the court when necessary and proper.

It is to be borne in mind, however, in passing, that as far as stenographers are concerned there is no attempt made by the charter provision to appoint any particular person as stenographer, or to appoint at all in the sense of the term as generally understood. It is left to the police judges to make the individual appointments—the charter provisions simply requiring that these appointments must be limited to two stenographers, and it is prescribed that these two shall attend on the court and take notice of all preliminary examinations held therein, and that their compensation shall be an annual sum for all services rendered. This provision of the charter can only be said to be an appointment of stenographers to the extent that, as the judges of the police court have power, under the general law, to appoint stenographers at will for each preliminary examination for a felony held by them and fix their compensation for such examination, it is an attempt to place a limitation upon such power to that extent.

As to whether a stenographer can be included in the cate-

gory of attachés who may be provided to the judge of the court, we do not think any general discussion of the meaning of the word "attaché" need be indulged in, because we are satisfied that, as employed in the constitutional provision, it is to be taken in the general and enlarged sense, as applying to any one recognized as a necessary adjunct to a court, tribunal, or office, and that by virtue of the necessity existing at practically all preliminary examinations, for the appointment of a stenographer, he should be treated as coming within that definition. Aside from this, however, the constitutional provision must be construed in the light of existing legislation, as to the relation of reporters to judges of police courts, when the amendment was adopted. Police courts of the city and county of San Francisco had been established by the legislature, and existed long prior to the adoption of this constitutional provision. These courts were given the same jurisdiction under the acts, and the judges thereof possessed the same power under the provisions of the Penal Code relative thereto, as to the examination of felonies committed in the city and county of San Francisco, as they are given under the charter provision now, or which they possess under the general law. Yet under these acts each judge of a department of the court was required to appoint a stenographer (Stats. 1889, p. 62, sec. 8; Stats. 1893, p. 9, sec. 8). It is true that it was further provided that such reporter should receive for his services the pay now allowed by law, but whatever his compensation was, his appointment by the judge of the police court was provided for by law, and it is only the fact that his appointment was so provided with which we are concerned. The only possible occasion when the judges of such courts, created under these acts, would be authorized to require his services, would be in taking testimony at preliminary examinations in felony cases, and yet it was deemed then proper that a regular stenographer should be appointed by the judge of each department, for attendance thereon, as essential to a proper exercise of the jurisdiction of the court and of his own. That these stenographers so appointed were at least attachés to the judge, we think cannot be successfully questioned. And for the purpose of taking the testimony in preliminary examinations, they were a necessary adjunct to the discharge by the judge of that duty.

And if anything were necessary to be considered aside from the particular provision of section 8½ of article XI, which we have been discussing, to strengthen the conclusion which we have reached, it is found in the closing portion of the general constitutional provision of which section 8½ is a part, and which provides that when a city and county government has been merged and consolidated into one municipal government it shall be competent, in the charter thereof, to provide for the election or appointment and the compensation of its county officers and of their deputies. This closing provision of the constitutional section indicates the general policy of the state relative to the control which such a municipality shall have over its officers, and reflects light upon the particular provision relative to police courts, their judges, and the clerks and attachés thereof. That policy is, that it shall be exclusively within the power of such chartered municipality to determine the compensation of all its officers, whether the duties to be discharged by them are imposed on such officers by the provisions of the charter, or are required to be performed by them as such municipal officers by virtue of the provisions of the general law of the state. (*Matter of Dodge*, 135 Cal. 513.)

We are of opinion, therefore, that, under section 8½ of article XI of the constitution, it was competent for the framers of the charter of the city and county of San Francisco to provide for the appointment and compensation of the attachés of the *judges* of the police court authorized to be created thereunder, and that stenographic reporters come within the category of attachés; and that it is of no moment that in conducting preliminary examinations the judge of said court acquires jurisdiction to do so as a magistrate under the general law. The purpose of the grant of power by the constitutional provision to the charter framers was to authorize them to provide for the appointment and compensation of all attachés to the *judges* of such court, no matter whether such attachés were necessary to a proper discharge of the duties of said judges under the provisions of the charter or under the requirements of the general law; the charter provision operated upon them as to their attachés by virtue of their existence as judges of the police court, created under the charter.

Express power being given to the framers of the charter to provide therein for the appointment and compensation of stenographic reporters as attachés to the judge of said court in whatever capacity as such judge he might be called on to act, and this having been done by the framers thereof, the provisions of the charter in that respect superseded section 869 of the Penal Code as far as it empowered a police magistrate of a city to appoint a reporter for a preliminary examination being held by him and to fix his compensation, because under section 8 of the constitution it is declared that the provisions of a charter authorized by that constitution shall supersede all laws inconsistent with it. It follows that the demurrer to the answer of defendant was improperly sustained and the judgment is reversed.

Angellotti, J., McFarland, J., Shaw, J., Van Dyke, J., and Henshaw, J., concurred.

BEATTY, C. J., concurring.—I concur. A shorthand reporter is not essential to the examination of a felony charge. The magistrate may, and often does, take down the depositions in longhand and have them subscribed by the witnesses at the time of the examination. The statute merely gives him the privilege, in his discretion, to appoint a reporter to take down the testimony in shorthand, and when that course is followed gives to the longhand transcript the same legal efficacy that it gives to a deposition regularly subscribed by the witness. (Pen. Code, sec. 869.) Conceding, then,—as I think must be conceded,—that the duty and the jurisdiction of the police judges of San Francisco to examine felony charges is solely dependent upon the provisions of the Penal Code, it does not by any means follow that the mere discretion of municipal officers to appoint assistants in the performance of a duty devolved upon them by the laws of the state may not be subjected to reasonable limitations by the municipal charter.

San Francisco being a consolidated city and county, the whole compensation of her police magistrates and their assistants is payable out of the municipal funds. The framers of her freeholders' charter have decided that two salaried shorthand reporters will suffice for the duty of taking down the evidence at preliminary examinations and have said, in effect,

to the police judges, You must get along with that number. It results, of course, that if more than two examinations were going on at the same time one or more of the judges would be deprived of the assistance of a stenographer. But that would not prevent them from performing the duty imposed upon them by the statute; it would only require somewhat more of their time, and some additional labor. This, however, would afford no ground for complaint that the policy of the state law was defeated or its operation impeded, and as regards the judge, he, as a municipal officer holding and enjoying the emoluments of an office created by the charter, could not with any consistency complain of a charter provision defining his duties. I can see no objection in any point of view to the charter provision. There is no real conflict between it and the state law; its utmost effect in any contingency being to compel an examination in San Francisco to be conducted in one of two alternative methods equally legitimate and effective and differing only in point of convenience and expense—a consideration peculiarly affecting the local taxpayers, and in that sense a municipal affair.

As to the competency of a municipal charter to regulate the compensation of municipal officers for the performance of all duties, including those devolving upon them under the general laws of the state, the case of *Matter of Dodge*, 135 Cal. 512, is conclusive. In that case it was not only held that the compensation of the assessor, payable out of the municipal treasury, could be fixed by the city charter, it was even held that a compensation allowed him by the general law out of the state funds, for services rendered exclusively for the benefit of the state revenue, could be taken away and covered into the local treasury for the benefit of the municipal salary fund. So long as that decision stands the right of the freeholders to fix the compensation of all municipal officers cannot be questioned. The stenographer appointed to report the proceedings at a felony examination is an officer—he must qualify by taking the oath of office—and in a consolidated city and county he is a municipal officer, and his compensation for all duties is subject, like that of the police judge, to regulation by the charter.

Rehearing denied.

[S. F. No. 8740. Department Two.—January 14, 1905.]

In the Matter of the Estate of CHRISTIAN BOLLINGER, Deceased. GEORGE W. WHYBARK, Executor of the Will of MARY A. L. BOLLINGER, Deceased, Appellant, v. GEORGE Y. BOLLINGER, Executor of the Will of Christian Bollinger, et al., Respondents.

WILLS.—CONTEST AFTER PROBATE.—CONTINUANCES.—DISMISSAL OF CONTEST.—DISCRETION NOT ABUSED.—Where more than one year had elapsed after the trial of a contest of a will after probate, at which the jury had disagreed, and the case, after being reset, was continued several times on account of the withdrawal of other attorneys and the illness of an attorney who was not present at the first trial, and there was no appearance, except to move for a further continuance, after ample time had been allowed to secure other attorneys, it was not an abuse of discretion to refuse to grant another continuance, and, where the contestant declined to proceed, to dismiss the contest.

APPEAL from a judgment of the Superior Court of Santa Clara County and from an order denying a new trial. M. H. Hyland, Judge.

The facts are stated in the opinion of the court.

W. W. Foote, and J. F. Conkey, for Appellant.

Charles W. Slack, and V. A. Scheller, for Respondents.

THE COURT.—This appeal is from an order dismissing the contest of appellant and from a final judgment against him. The question to be determined is as to the ruling of the court on appellant's motion for a continuance. Appellant had filed a contest, after probate, of the will of deceased, which came regularly on for trial in September, 1900, and after a trial occupying several weeks resulted in a disagreement of the jury.

Appellant was represented of record in the contest by three attorneys, W. W. Foote, J. J. Lermen, and Nicholas Bowden. The case was again regularly set for trial for September 17, 1901, and was then continued on motion of appellant's attorneys to September 24, 1901. This continuance was granted

upon a statement made by one of appellant's attorneys that Mr. Foote was ill and unable to attend the trial. At this time the court informed counsel that if they were not ready to proceed with the case on September 24th they must obtain other counsel and be ready to proceed on that day. On September 24th appellant appeared by his attorneys, Bowden and Lermen, and again moved for a continuance upon affidavits showing that Mr. Foote was in poor health and unable to attend the trial; that Lermen had expected Mr. Foote to try the case and had made his business engagements accordingly, and had other cases set in court for many succeeding weeks; that Bowden had been employed only to assist in selecting a jury, and was not sufficiently familiar with the facts of the case to proceed with the trial.

The court denied the application for a further continuance, and thereupon attorneys Bowden and Lermen withdrew from the case and refused to proceed. The court thereupon excused the jurors who were in attendance and ready for the trial of the case, and continued it again to September 25, 1901, at which time Mr. Kerwin appeared for appellant and asked for a further continuance for three months, stating that he appeared solely for that purpose. No reason was given as to why appellant had not employed other counsel to appear for him generally. The court, however, again continued the case to October 1, 1901, at which time Mr. Kerwin again appeared for the sole purpose of moving for a further continuance, and in support of the motion read affidavits stating that the case was one of much importance, and that it would require an attorney from sixty to ninety days to familiarize himself with the law and facts and to prepare for a trial. The court thereupon denied the motion for a further continuance, and contestant declining to proceed, the court made an order dismissing the contest.

The court did not abuse its discretion in denying the continuance. The case had been pending for a long time. Mr. Foote did not appear or take part in the trial which took place in 1900. More than a year had elapsed since that trial. Appellant had been given every opportunity to employ counsel if he so desired. In important cases courts should grant reasonable and proper time to parties to employ competent counsel and prepare for trial, and, to the credit of the trial

judges, they are seldom appealed to in vain for a reasonable continuance. It is much better to "make haste slowly," with the view of allowing all parties a reasonable time to procure their witnesses and prepare for trial, but at the same time the ends of justice require that cases should be tried, disposed of on their merits, and unreasonable delays prevented. Estates should not be tied up by contests and kept in court for many years, regardless of the rights of the heirs or devisees. If a contest of a will is initiated in good faith, and the contestant shows due diligence, every opportunity should be given for a full investigation of the issues made by the contestant, but if a contest must be continued for an indefinite time every time an attorney withdraws from the case, there would be no end to the matter.

The judgment and order are affirmed.

Hearing in Bank denied.

[S. F. No. 8092. Department Two.—January 14, 1905.]

PATRICK ROONEY, Respondent, v. GEORGE F. GRAY and HARRY GRAY, Copartners as Gray Brothers, and MARY LYNDE CRAIG, Defendants; GRAY BROTHERS, Appellants.

PLEADINGS—SECOND AMENDED COMPLAINT—ERRORS IN RULING UPON FORMER COMPLAINTS.—Where issues were joined and a trial had upon a second amended complaint the former complaints were superseded, and any errors in rulings made upon the former complaints are immaterial.

IS.—SUFFICIENCY OF AMENDED COMPLAINT—INJUNCTION—DAMAGES—DEMURRER—MISJOINDER OF CAUSES.—Where the second amended complaint sought an injunction to restrain injuries to plaintiff's premises from blasting operations of the defendant, and for damages for injuries sustained thereby, and in aid of the injunction not only alleged the throwing of large rocks upon his premises, but also set forth injuries to sewers, causing sewer gas to arise on the premises, and clouds of fine dust, affecting the health of plaintiff and his family, and injuring their carpets, curtains, and furniture, a demurrer for misjoinder of causes of action was properly overruled.

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ID.—IMPROPER ASSUMPTIONS IN DEMURRER.—Grounds of demurrer assuming that the complaint was solely one for damages were properly overruled.

ID.—UNCERTAINTY AS TO DAMAGES—SPECIFIC DENIALS OF COMPLAINT—TRIAL.—Though the amended complaint was to some extent uncertain as to the exact amount of the damages sustained by plaintiff for the particular injuries complained of, yet where the answer specifically denied all the allegations of the complaint and a trial was had upon the issues thus joined, the defendants were not prejudiced by the refusal of the court to sustain a demurrer for such uncertainty.

ID.—CHANGE IN ORDER OF JUDGMENT—ABSENCE OF BILL OF EXCEPTIONS.—A change in the order for judgment without setting aside or modifying the first order, is not available upon the judgment-roll alone, in the absence of a bill of exceptions to such change.

ID.—JUDGMENT FOR DAMAGES—ABSENCE OF INJUNCTION—APPELLANTS NOT PREJUDICED.—The appellants cannot be prejudiced by a judgment for damages warranted by the evidence, and cannot complain that no injunction was awarded against the appellants.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. James M. Seawell, Judge.

The facts are stated in the opinion of the court.

Fisher Ames, for Appellants.

Barna McKinne, for Respondent.

LORIGAN, J.—This action was brought to enjoin the defendants—the Gray Brothers—from working and operating a quarry and rock-crushing plant adjoining the premises of plaintiff in the city and county of San Francisco, and also to enjoin the defendant Craig, the owner of the premises upon which said quarry and rock-crushing plant is located, from renting them to the said Gray Brothers for such purpose. Plaintiff sought also to recover damages in the sum of five thousand dollars from the Gray Brothers for injuries to three dwelling-houses on his premises, it being alleged that the concussions occasioned through the blasting operations in said quarry had loosened and weakened the foundations of said houses, causing them to settle; that the blasts had broken the windows and projected large rocks through the sides and roofs of said dwellings, breaking large holes therein, rendering them unfit for use or occupation; and that the said Gray

Brothers had negligently placed large quantities of dirt, waste rock, and screenings from their quarry on vacant land adjoining plaintiff's premises, which, during a heavy rainstorm, was washed down and carried on the premises of plaintiff and deposited to the depth of from four to six feet against the west wall of a two-story frame dwelling owned by plaintiff, which caused said dwelling to be thrown out of plumb, bulged in the center, and greatly injured. The court rendered judgment in favor of plaintiff against the Gray Brothers for fifteen hundred dollars, and in favor of the defendant Craig against plaintiff for costs.

From this judgment the Gray Brothers appeal, and the case is presented here upon the judgment-roll, accompanied by bills of exceptions as to some points of alleged error not available on the face of the roll.

1. The complaint in this case was twice amended, and it is urged that the court erred in overruling defendants' several demurrers to the original and the two amended complaints and denying their motion to make the original complaint more certain and definite, as likewise their motions to strike out certain portions of the second amended complaint, and it is the accuracy of the rulings of the court on these several motions which is presented under the bills of exceptions.

We are not concerned, however, with the rulings of the court upon the original or first amended complaint. These pleadings were superseded by the second amended complaint, which was answered by the defendant, and upon the issues thus made the cause was tried and judgment rendered. If this second amended complaint was not vulnerable to the attack the defendants made upon it by demurrer or motion to strike out, then it is of no moment whether the court erred in its rulings on the demurrer or motion to the previous pleadings of plaintiff or not; the sufficiency of this last pleading is alone in question.

This demurrer to the second amended complaint, to treat of it briefly and in respect to the particular points upon which it is urged it should have been sustained, was interposed upon the assumption, unwarranted by the pleadings, that the complaint was framed for the recovery of damages solely, while it is clear that under it plaintiff sought an injunction to restrain defendants from further prosecuting blasting and rock-crushing

in the vicinity of his premises, as well as for damages which he alleged he had already sustained in injuries to his dwellings thereby. With a view of sustaining a right to an injunction, plaintiff averred, among other things, that the quarry was operated in such a manner by the Grays as to constantly throw large rocks upon his premises, which covered the land with débris; that large amounts of dirt and screenings from said quarry deposited by the defendants on the streets and sidewalks adjoining the premises of plaintiff had been swept by wind and rain upon his premises, filling up the sewers, preventing the sewage from flowing therein, and causing great volumes of sewer-gas to arise therefrom, endangering the health and lives of plaintiff, his family, and his tenants; that his houses (two of which were occupied by tenants, one by himself) were being injured from rocks cast upon and hurled through them, and the lives and safety of their occupants endangered thereby; that the effect of the said blasts and operations of the rock-crusher was to cause great clouds of dust and fine sand to arise, filling the air about and in plaintiff's houses, to the great injury of the health of the plaintiff and his family, and that said dust settled in the houses, ruining the carpets, curtains and household furniture therein.

It is clear from these allegations of the complaint, that they were made with a view of obtaining an injunction against defendants, and, except as to the allegations of plaintiff's injuries to his houses from the blasts, were not made the basis of the demand for damages.

So that in this view there was no merit in defendants' demurrer on the ground that several causes of action—damages for injuries to the person and damages for injuries to the property—were improperly united, or, if not improperly united, should have been separately stated, and hence the demurrer on this ground was properly overruled. The only damages sought were for injuries to the houses, particularly the two-story dwelling, the allegations concerning which we have already called attention to.

There are other grounds of demurrer interposed which could not possibly have any merit, unless on the assumption that the complaint was solely one for damages, and as it appears that that assumption is entirely erroneous, it would be waste of time to attempt to discuss them.

The demurrer urged also various particulars in which the complaint was uncertain, most of which, like the other grounds of demurrer just disposed of, being predicated on a false theory as to the scope of the complaint, have no force.

It is particularly insisted, however, in the same line, that the demurrer should have been sustained upon the ground that, as to the injuries to his property for which plaintiff did seek damages, the complaint is uncertain as to the manner, extent, or amount thereof.

It must be conceded that a more perfect pleading in this respect, as in some other particulars, might have been prepared, especially after three efforts in that regard, and it is possible that it may be to some extent open to the last objection urged against it—that it does not set forth with sufficient certainty the exact amount of damages sustained by the particular injuries complained of, although as to the manner and extent of those injuries the complaint is clearly certain enough. Yet we do not think it so fatally defective as to the allegation of damages that the order of the court overruling it should be reversed. The general rule requiring the amount of damages sustained by several alleged wrongful acts of a defendant to be stated with exactness is in order that the defendant may have an opportunity of determining whether he will concede a good cause of action for any or all of the amounts claimed, or that, if not so conceding, he may be able to prepare himself with evidence upon the trial to contest them. (*Mallory v. Thomas*, 98 Cal. 644, 647; *Foerst v. Kelso*, 131 Cal. 376, 378.) Now, it is quite evident from the record in this case that the defendants were not injured by the refusal of the court to sustain the demurrer in this respect under the above rule, or any extension of it which now suggests itself to us, because the answer of the defendant consists of a specific denial of all the allegations of the complaint. They deny that any of the injuries asserted by plaintiff occurred either through their acts or at all. Having presented these square issues, and the cause having been tried on them, it cannot be said that the alleged uncertainty in the complaint as to the amount of damages claimed to have been sustained by plaintiff, could have misled or prejudiced the appellants, as their contention was that the plaintiff had suffered no injury at all.

When a case has been tried and a judgment rendered on the facts, in order to warrant a reversal upon the ground of error in overruling a demurrer interposed on the ground of uncertainty in the complaint, it must appear that some substantial right of the demurrant has been affected, some prejudicial error, as distinguished from abstract error, suffered by him, or he has no room for complaint. (*Alexander v. Central etc. Co.*, 104 Cal. 537; *Foerst v. Kelso*, 131 Cal. 376, 378.)

As to the motion to strike out portions of the second amended complaint, it is enough to say that the court granted the motion as far as the defendant was entitled to it.

2. In the record appears a "minute order for judgment" made by the trial court May 10, 1901, ordering that plaintiff have judgment against defendant for the sum of fifty dollars. On December 7, 1901, findings and conclusions of law awarding plaintiff fifteen hundred dollars damages were filed and a judgment for that amount recorded and docketed.

It is insisted by appellants that the court erred in making a second and different order for judgment, without setting aside or modifying the first.

But this point is not available to the appellants on the record. It cannot be considered upon an appeal from the judgment on the judgment-roll alone; it should have been presented for consideration to this court on a bill of exceptions. The first order for judgment may have been set aside by consent of the parties or by an order of the court, and the entry in the minutes to that effect would not appear in the judgment-roll. As is said in *Paige v. Roeding*, 96 Cal. 391, relative to the setting aside of a prior judgment, and which applies with all the more force as to setting aside a prior order: "Circumstances may have arisen wherein the trial court would have been justified, under the law, in setting aside the first findings and judgment, and in filing the second findings and judgment; and with no showing to the contrary, we must assume that such circumstances did arise. . . . As already suggested, we find no bill of exceptions in the record, and it is only upon a bill of exceptions that we would be allowed to examine into the sufficiency of the reasons which moved the court to set aside and declare void its first judgment rendered in the case. Its order may have been erroneous, or

it may have been entirely void, but the matter is not a proper subject of inquiry before us, not having been presented for a review in any form authorized by the statute." (Also, *Von Schmidt v. Von Schmidt*, 104 Cal. 549.)

3. There is nothing in the point that the court failed to find upon the issue as to the right to an injunction. As we read the findings, we think it did. But if it did not it could not affect the judgment which was rendered. This was solely for damages, and was based upon sufficient findings to warrant it, and plaintiff was entitled to recover such damages thereunder whether there was a finding on the issue of the right to an injunction or not. The court awarded no injunction against appellants, and they have no cause to complain.

The judgment appealed from is affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 3062. Department Two.—January 16, 1905.]

JEREMIAH F. SULLIVAN et al., Respondents, v. HENRY T. GAGE et al., State Board of Examiners, Appellants.

ACTION BY STATE—DISSOLUTION OF CORPORATION—VOID ORDER FOR RECEIVER—ALLOWANCE OF ATTORNEYS' FEES AGAINST STATE—REJECTION BY BOARD OF EXAMINERS—MANDAMUS.—Where an action was brought by the state to dissolve a corporation, and the court therein made a void order appointing a receiver, and upon report of the receiver made an order allowing his attorneys compensation against the state, without notice to the state, and a claim therefor was repeatedly presented by the attorney to the state board of examiners, and repeatedly rejected by it, its action in rejecting it was discretionary and judicial, and *mandamus* will not lie to compel the board to allow it.

1b.—ATTORNEYS' FEES NOT COSTS.—The attorneys' fees allowed by the court are not costs against the state within the meaning of section 1038 of the Code of Civil Procedure, which the board has no discretion to reject, when the judgment therefor is final.

1b.—VOID ORDER OF ALLOWANCE.—The allowance of attorneys' fees being based on the void order appointing the receiver, he cannot be

regarded as a receiver, and the court had no power to allow attorneys' fees based upon such void order, and the order allowing the same is itself void. The order should have run to the receiver, and not to the attorneys for the receiver as such, who can have no right of action to enforce them, and the allowance to them is void.

ID.—JURISDICTION OF BOARD OF EXAMINERS.—The board of examiners is forbidden to entertain a demand against the state once rejected by it, unless such facts are presented to the board as between individuals would be ground for a new trial.

ID.—VOID JUDGMENT OF ORDER—EFFECT OF DISMISSAL OF APPEAL.—The dismissal of an appeal from a void judgment or order is an affirmation thereof only in a limited sense, and imparts no validity thereto.

ID.—CONSTITUTIONAL LAW—VOID SPECIAL APPROPRIATION.—A special appropriation act which contains several items which are not for a single purpose is void, as being in violation of section 34 of article IV of the constitution.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

W. C. Van Fleet, for Appellants.

Sullivan & Sullivan, for Respondents.

HENSHAW, J.—This is an appeal from a judgment in favor of plaintiffs awarding a temporary writ of mandate against the defendants, the state board of examiners, commanding the board "to forthwith approve and allow" a claim of the plaintiffs against the state of California for five thousand dollars.

The facts material to this consideration are as follows: In 1888 an action was commenced by the people of the state of California, upon the relation of George A. Johnson, attorney-general, under section 803 of the Code of Civil Procedure, against the American Sugar Refinery Company, a corporation, to obtain a judgment excluding that corporation from its corporate franchise on the ground of misuser. In January, 1890, a judgment was rendered in this action excluding the corporation from the franchise, dissolving it as a corporation and imposing a fine upon it, and in February, 1890, the court, upon the application of the attorney-general, and upon

order directing the defendant to show cause, made its order appointing Patrick Reddy receiver in the action, to take possession of all the property of the corporation, and to hold the same pending the appeal from the judgment. Reddy qualified as receiver, took possession of some of the property of the corporation, and so continued until the ninth day of June, 1890. Upon that date a writ of prohibition was issued from this court in the case of *Havemeyer v. Superior Court*, 84 Cal. 327,¹ adjudging that the order of the superior court appointing Patrick Reddy receiver and all orders made by the superior court in pursuance of aid thereof were null and void and of no effect and in excess of the jurisdiction of the superior court, and the superior court and its judge were prohibited and restrained from in any manner acting upon and enforcing the orders, or either of them, and the court was further commanded without delay to revoke and annul the orders and each of them.

On January 10, 1891, Patrick Reddy filed in the superior court his account and report of his administration as receiver, in which he stated that he had been "obliged to employ counsel for the purpose of advising him in his duties in the premises, and did employ Messrs. Sullivan & Sullivan" (plaintiffs herein), and that their services as such were reasonably worth five thousand dollars. On the same day the superior court made its order appointing M. C. Blake a referee to take proofs as to the matters embodied in the report, and to report, amongst other things, "the amount proper to be allowed as compensation for the services of Messrs. Sullivan & Sullivan, attorneys at law, rendered to said Reddy while acting as such receiver." On February 3, 1891, Blake made his report, which contained the statement that Messrs. Sullivan & Sullivan had acted as attorneys and counsel of the receiver in all the matters of said receivership, and had rendered valuable and important services, and that such services were reasonably worth the sum of five thousand dollars, and that no payments had been made on account thereof. On the day upon which the report was filed the court made its order approving it, which order contained the following: "And it is further ordered, adjudged and decreed that Messrs. Sullivan & Sullivan are entitled to the sum of five thousand (\$5,000) dollars from the state of Califor-

¹ 18 Am. St. Rep. 192.

nia." No notice was given to the state of any of these proceedings, nor was the state represented at any of these hearings. In April, 1891, the attorney-general took an appeal to this court from this last-quoted order or judgment. On December 14, 1892, and while this appeal was pending, plaintiffs presented to the state board of examiners their claim for "professional services rendered by said Sullivan & Sullivan, as attorneys and counselors for the receiver appointed by the superior court of the city and county of San Francisco, state of California, in that certain action entitled 'The People of the State of California, upon the relation of George A. Johnson, Attorney-General, plaintiff, vs. American Sugar Refinery, defendant,' during the first six months of the year A. D. 1890. Said sum of \$5,000 (five thousand dollars) was fixed and allowed as the fee of Sullivan & Sullivan for said professional services by the superior court of the city and county of San Francisco, by order of said court, duly given, made and entered in said court on the third day of February, 1891." On December 15, 1892, the board of examiners made its order rejecting the claim as follows: "The annexed account for \$5,000.00, presented by Sullivan & Sullivan for legal services (case of *People v. American Sugar Refinery Company*), 41st fiscal year, is rejected and disallowed under section 662, Political Code, because the board is of the opinion that the state is not liable in view of the facts, evidence, and decision of the supreme court in the case of *Havemeyer v. Superior Court*, 84 Cal. 327,¹ and *Havemeyer v. Superior Court*, 87 Cal. 267." Thereupon plaintiffs appealed to the legislature from this disallowance of their claim, and served notice upon the state board of examiners of their appeal. In 1895 the legislature passed the following act (Stats. 1895, p. 238):—

"An act appropriating money to pay the claims of H. P. Dyer, F. F. Dyer, C. A. Granger, Gaston Goldsmith, and Sullivan & Sullivan.

"The people of the state of California, represented in senate and assembly, do enact as follows:

"Section 1. The sum of eight thousand six hundred and forty-five dollars is hereby appropriated out of any money in the state treasury not otherwise appropriated, to pay the

¹ 18 Am. St. Rep. 192.

claim of H. P. Dyer for four hundred and six dollars; C. A. Granger for four hundred and thirty-one dollars; F. F. Dyer for two thousand seven hundred and seventy-five dollars; Gaston Goldsmith for thirty-three dollars; and Sullivan & Sullivan for five thousand dollars; which amounts have been assessed as costs against the state of California in the case of *The People of the State of California v. The American Sugar Refinery Company*, number twenty-four thousand three hundred and eighty-one, in the superior court of the state of California, in and for the city and county of San Francisco."

Thereafter, and upon July 12, 1895, Messrs. Sullivan & Sullivan again presented to the board of examiners a claim reciting the facts above stated as to the report of Mr. Reddy, its reference to Mr. Blake, his report thereon, and setting forth "that thereafter said report came on regularly for hearing before said superior court, and said court, after due consideration, duly gave and made a judgment confirming said report and directing payment to said Sullivan & Sullivan of said sum of five thousand dollars; that said judgment has never been reversed, vacated, or set aside; that on the 27th day of March, 1895, an act of the legislature of the state of California was duly passed and approved by the governor of said state, appropriating out of the moneys in the state treasury not otherwise appropriated the sum of five thousand dollars to pay said claim of Sullivan & Sullivan."

On December 13, 1895, the state board of examiners again rejected the claim in the following order: "The annexed account for \$5,000.00, presented by Sullivan & Sullivan for legal services in the case of *The People v. Am. Sugar Refinery Company*, is rejected and disallowed under section 662, Political Code, because not a legal charge against the state." This last-mentioned claim was also presented and acted upon by the state board of examiners, while the appeal from the order of the superior court was still pending. On February 7, 1899, this court made its order dismissing the appeal theretofore taken by the state from that order for the failure of the appellant to file any transcript on appeal. And upon March 10, 1899, the *remittitur* on such appeal was filed in the superior court. On March 6, 1899, the plaintiffs again presented to the board their claim, and on June 27, 1899, the board again rejected the claim, stating "This claim is dis-

approved by the board of examiners. First—Because the demand was rejected by the state board of examiners for sufficient reason on Dec. 15, 1892; and a second time rejected by said board for sufficient reason on the 13th day of Dec., 1895; and there appears no law whatever authorizing this board to entertain the same demand a third time. Accordingly the board disapproves this claim, and causes the same to be filed with the records of the board with the foregoing statement showing such disapproval and the reasons therefor." Upon this rejection, the plaintiffs sued in mandate, and, as has been stated, obtained a judgment of the trial court commanding the board of examiners "to forthwith approve and allow" their claims, and from this judgment the state board of examiners has appealed.

Appellants' first contention against the judgment may thus be stated: The board of examiners, in passing upon claims such as this, is vested with discretionary and judicial powers; mandate will not lie to compel it to exercise those powers in any given way, or, as here, to force the board to approve and allow a claim. Second, mandate will not lie in this case, because the board has already acted, has exercised its discretionary and judicial powers, and has three times rendered its judgment against the validity of the claim. Plaintiffs' only redress is by direct appeal from such judgment, or by such other appropriate mode of relief as the state has provided, and if the state has provided no mode of relief, then the action of its agent, the board of examiners, is final and conclusive.

Respondents, in answer to this, admit the well-settled rule that mandate will not lie to compel a tribunal exercising discretionary and judicial functions to act in a particular way, but they insist that mandate will lie to compel specific form of action where no discretionary or judicial powers are vested with the board, or with the tribunal, and where but one form or course of action is open to them upon the claim; and they insist that their own case is of the latter sort. Furthermore, they urge against the objection that the board has already acted by rejecting the claim, that these orders of rejection do not constitute *res adjudicata* against them for the reason that at the time of these rejections the appeal from the order allowing them counsel fees was still pending in the court, and

was therefore *sub judice*; while at the time of the commencement of this action, by a dismissal of that appeal, the order had become final and valid by operation of the judgment of dismissal.

The duties and powers of the board of examiners in these matters are prescribed by sections 660 and 661 et seq. of the Political Code. Three classes of claims are there specified: The one for which appropriations have been made (secs. 660, 661, 662); the second those for the settlement of which provision has been made by law, though no specific appropriation has been made therefor (sec. 663); and the last those for the settlement of which no provision has been made by law (secs. 664, 665, 666). As to the third class, the board has no power other than "to report to the legislature such facts and recommendations" as they deem proper. In acting upon a claim of the other two classes the board is authorized, by these sections, either to approve or disapprove it. Respondents, in support of their contention that the state board of examiners was not called upon to exercise discretionary and judicial functions in the matter of their claim, place great reliance upon the case of *Lawrence v. Booth*, 46 Cal. 187. That was mandate against the state board of examiners to compel the allowance of a claim for costs in an action commenced by the district attorney upon behalf of the state, which costs were assessed by the district court under the provisions of a special statute, the contention of the defendant board being that the award of costs by the district court was not conclusively binding upon it, and did not, therefore, control its action. That contention was disposed of in the following language: "At all events, the requirement of the statute, as we construe it, is positive, that the cost of publication, as taxed by the court, shall be paid by the state. This leaves to the auditing officers no discretion as to the amount for which the claim shall be allowed. It must still pass through the hands of the board of examiners, in the ordinary routine of business, but the amount allowed can be no other than that fixed by the judgment of the court." Here, it will be observed, was waged no controversy over the provisions of the statute, nor over the validity of the order of the court in fixing costs, the point of difference being merely, as has been stated, whether the court's allowance absolutely controlled the

action of the board of examiners. Apart from such exceptional cases as that illustrated in *Lawrence v. Booth*, 46 Cal. 187, it is unquestionably the fact, and has been so declared by this court, that the state board of examiners does exercise, in the generality of cases, discretionary and judicial functions, making their acceptance or rejection of a claim not only final, but free from collateral attack. And so it is distinctly laid down as to the powers of this board upon these very claims in *Cahill v. Colgan*, (Cal.) 31 Pac. 614, where it is said: "The board of examiners has unlimited power to investigate the merits of all claims presented for allowance, and may act upon facts within the personal knowledge of its members, as well as upon evidence from other sources. (Pol. Code, secs. 658, 666.) It was the duty of the attorney-general, as a member, to impart to the board his personal knowledge of all material facts in regard to the suit of *People v. Havemeyer*, which suit had been prosecuted by him; and he must be presumed to have performed this duty. In the matter of approving and rejecting claims against the state, the board of examiners acts judicially, and its decisions in cases of which it has jurisdiction are not subject to collateral attack. In his work on Judgments (sec. 532) Mr. Black says: 'When the statutes commit to a board of county commissioners, or supervisors, or auditors, or to a town council, the duty of examining and auditing claims against the municipality, their action in auditing, adjusting, or rejecting such a claim is judicial in its nature, and their decision is binding and conclusive, unless reversed on appeal'; citing, among other cases, *Osterhoudt v. Rigney*, 98 N. Y. 222; *Colusa County v. De Jarnett*, 55 Cal. 373; *Placer County v. Campbell*, (Cal.) 11 Pac. 602. In *Osterhoudt v. Rigney*, 98 N. Y. 223, the court said: 'The acts of a board of audit, within its jurisdiction, in the absence of fraud or collusion, are final and conclusive, and cannot be questioned on a collateral proceeding. Whether the claim is a proper town or county charge, in a case where it is doubtful, and rests upon disputed evidence, and what amount shall be allowed when not fixed by statute, are questions which the statute commits to the determination of the board of audit; and however much it may err in judgment upon the facts, so long as it keeps within its jurisdiction, and acts in good faith, its audit cannot be overhauled, but is final,

as well as to the taxpayers as to the claimants.' (See, also, *Robinson v. Supervisors*, 16 Cal. 209; *Miller v. Sacramento County*, 25 Cal. 94; *Emery v. Bradford*, 29 Cal. 84; *Scheerer v. Edgar*, 76 Cal. 569; *Bernal v. Lynch*, 86 Cal. 135; Black, Jdgm., sec. 250.)" In further support of the principles here enunciated, and on the proposition that mandate will not lie to compel specific action by a tribunal vested with discretionary powers, may be cited *Tilden v. Supervisors*, 41 Cal. 68; *Berryman v. Perkins*, 55 Cal. 483; *Strong v. Grant*, 99 Cal. 100; *Jacobs v. Supervisors*, 100 Cal. 121. While in *Wood v. Strother*, 76 Cal. 545, upon which respondents rely, it is said; "If the determination of the tribunal was intended to be final, it is plain that it cannot be disturbed, either on *mandamus* or in any other way. If it was not intended to be final, but there is other 'plain, speedy, and adequate remedy,' the writ cannot issue; for it was not designed to usurp the place of other remedies."

We are thus brought to consider whether the claim before us presents a case within the exception to the general rule as noted in *Lawrence v. Booth*, 46 Cal. 187, for if it does not, then clearly this action will not lie. Herein respondents cite section 1038 of the Code of Civil Procedure, to the effect that when the state is a party, and costs are awarded against it, they must be paid out of the state treasury, and their argument which follows is, that the award which the court made in their favor was in effect an award for costs in the action, and that the order fixing the amount having been made by a court of competent jurisdiction, and the appeal from that order to this court having been dismissed, the matter becomes an absolute finality, and that naught is left for the state board of examiners but to approve their claim. But the parallel between this case and that of *Lawrence v. Booth* would be much closer were it not for the objections which are presented to all these matters. In the first place, section 1038 is dealing merely with "costs" as such. Plaintiffs' claim is not a claim for costs within the meaning of this section and of its chapter, nor was the award made to them by way of costs.

Moreover, the validity of the order itself is here called in question, whereas the validity of the order made in *Lawrence v. Booth* was never in controversy. It is beyond peradventure that this court decided that the appointment of the receiver in the case of *People v. American Sugar Refinery* was void

as being in excess of the jurisdiction of the court. (*Havemeyer v. Superior Court*, 84 Cal. 327,¹ and *Havemeyer v. Superior Court*, 87 Cal. 267.) This, it will be observed, does not present the case of a reversal of an order appointing a receiver for mere error or irregularity in its procurement. It presents the case of an order void for want of legal authority, where the receiver, in point of law, was not a receiver but a trespasser. It is so stated in *Costa v. Superior Court*, 137 Cal. 79, where it was held that the superior court had no jurisdiction to appoint an administrator of the estate of a living person, and the appointment was therefore in excess of jurisdiction and void. This court said: "In this case the court finds that it has never acquired jurisdiction of the subject-matter involved in the proceedings. Its previous orders were entirely void, and in this very judgment it is so declared. The petitioner, therefore, has not been placed in possession of the property by any valid order or process of the court. After the judgment declaring the grant of administration and all subsequent proceedings void, the petitioner will be regarded as a trespasser from the beginning. He cannot be regarded as a receiver whose possession is that of the court." (See, also, *Staples v. May*, 87 Cal. 178.) The cases are not infrequent where the court has settled the account of a receiver erroneously appointed and made the amount a charge against the party who has procured the appointment, but no case has been brought to our attention where a court has made such an order when its own judicial act in appointing the receiver was nugatory and void for want of jurisdiction. The receiver is not obliged to accept such appointment, and in such a case as this, as the court was without power to appoint him, it must equally be without power to make any other order depending for its validity upon the order of appointment. The utmost that is left for a receiver appointed under such circumstances is his right of action for compensation against the party procuring his appointment. Thus, in *Grant v. Superior Court*, 106 Cal. 324, where this court denied a writ of prohibition, it is said: "It is suggested, however, that an order fixing the receiver's compensation in this proceeding might conclude the rights of the petitioners as to costs to be included in the final judgment or in a separate action by

¹ 18 Am. St. Rep. 192.

Silver to recover the amount allowed. But they certainly cannot be concluded by the order in any collateral proceeding or new action if the court has no jurisdiction to make it." And in *Grant v. Los Angeles etc. R. R. Co.*, 116 Cal. 71, it was contended by appellant that, as the order appointing the receiver was absolutely void upon its face for want of jurisdiction in the court to make it, the order fixing the compensation of the receiver, being founded thereon, was equally void, and this court, after discussion, summed the matter up in the following sentence: "That order [appointing the receiver] being void, the present order must of necessity be held as to appellant likewise void." So here it must result that the order allowing compensation, being based upon a void order appointing the receiver, is itself void.

But these are not the only considerations. The order, it is to be noted, is an order directing the payment of the money to Sullivan & Sullivan, and not to the receiver. Yet it is in favor of the receiver alone that the order should have run. The employment of Sullivan & Sullivan came wholly from the receiver, and to him alone were they entitled to look for compensation. If the order in question be construed as a judgment in favor of Sullivan & Sullivan, it is a judgment in favor of one not a party to the action nor an officer of the court. If it be construed as an order, then it is fatally defective in that the order should have run in favor of Mr. Reddy, and should have been an allowance to him upon account of his obligation to the attorneys whom he had employed. It is thus declared in *Stuart v. Boulware*, 133 U. S. 78, where the court says: "If it were proper for the receiver to employ counsel the allowance of reasonable counsel fees is to the receiver, and not directly to the counsel, and such fees would constitute only one of the items in the receiver's account; the counsel had no cause of action, but the allowance was in legal effect to the receiver to enable him to make compensation for professional services." Nor is this distinction unimportant. The receiver might have a cause of action against the party securing his appointment, whereas the attorney for the receiver has no such right of action, and can look for compensation only to the person who appointed him. So in this case Sullivan & Sullivan would have no right of action against the state. That right of action would be

vested in Mr. Reddy alone. Their sole right would rest in their claim against the receiver. The same principle was declared in *Sharon v. Sharon*, 75 Cal. 1, and *Henry v. Superior Court*, 93 Cal. 561.¹ In each of those cases an order making allowance to the attorneys directly was held to be void, and in the latter case it was annulled on *certiorari*.

It thus appears that the claim presented to the state board of examiners was a claim essentially calling for the exercise of discretion and judgment, and that this was employed with the result that the claim was three times rejected. It might well be sufficient to rest the matter here, but in addition to what has been said another sufficient reason may be advanced. Section 670 of the Political Code provides as follows: "The board must not entertain, for the second time, a demand against the state once rejected by it or by the legislature, unless such facts are presented to the board as in suits between individuals would furnish sufficient ground for granting a new trial." It is not disputed that the claims presented were the same. But one change had occurred since the rejection of the claim in 1895 and its new presentation and rejection in 1899, and that is, that the state's appeal from the order which forms the basis of the claim had been dismissed. Upon this it is contended, as has before been stated, that the fact of dismissal not only worked an affirmance of the order appealed from, but established its validity, and that therefore the former rejection cannot be regarded as *res adjudicata*, and the situation was different in important legal particulars at the time of the last presentation and rejection. But the claim was last presented upon March 6th, and the judgment of dismissal did not become final by the going down of the *remittitur* until March 10th. So at the time of the last presentation the appeal, in contemplation of law, was still pending, and the position of the claimants was precisely the same as it was in 1895. But, aside from this, the dismissal of the appeal from the order was not an affirmance of the order so as to give it any validity which otherwise it did not possess. A dismissal of an appeal is an affirmance of the judgment only in a limited sense. If the judgment is void on its face, the dismissal of the appeal from it in no wise cures such vital defect. At the most, the dismissal prevents a second appeal,

¹ 27 Am. St. Rep. 223.

and relieves the order or judgment from attack for error or irregularity which could have been taken advantage of upon appeal. (*Smith v. Westerfield*, 88 Cal. 374; *Ritzman v. Burnham*, 114 Cal. 522; *United States v. Gomez*, 23 How. 326.) Says this court in *Pioneer Land Co. v. Maddux*, 109 Cal. 633:¹ "The affirmance of the appellate court of a void judgment imparts to it no validity; and especially if such an affirmance is put upon grounds not touching its validity. . . . The supreme court of Mississippi said that the affirmance of a void judgment on appeal, upon grounds not touching but overlooking its invalidity, did not make it valid. When a judgment is lacking in any of the foregoing particulars, it matters not whether it was rendered by the highest or lowest court in the land—it is equally worthless. No one is bound to obey it. The oath of all officers, executive, legislative, or judicial, compels them to disregard it." It follows, therefore, that the mere fact that the appeal had been dismissed did not impart any validity to this void order.

There is left for consideration the effect of the legislative act above quoted. The claim which was presented to the state board in 1895 was based upon the act and was rejected. In this particular the situation is not changed since the rejection of that claim, and no new rights which would "furnish sufficient ground for granting a new trial" have been shown. In that view of the case it was the duty of the board of examiners to refuse to consider the claim anew, and plaintiffs were barred by the rejection of 1895. And, finally if the validity of the Appropriation Act itself be involved, it is without doubt violative of section 34 of article IV of the constitution, which provides that "No bill making an appropriation of money, except the general appropriation bill, shall contain more than one item of appropriation, and that for one single and certain purpose to be therein expressed." The language of this section is so plain that read side by side with the act in question it would seem to cut off the need of discussion. There is here not only more than one item, but the items themselves are not for a single purpose. (*Murray v. Colgan*, 94 Cal. 435.)

The judgment appealed from is therefore reversed.

McFarland, J., and Lorigan, J., concurred.

¹ 50 Am. St. Rep. 67.

[L. A. No. 1625. Department One.—January 17, 1905.]

WESTERN UNION OIL COMPANY, Appellant, v. JOSEPH and CHARLES NEWLOVE, Executors, etc., et al., Respondents.

QUIETING TITLE—BOUNDARY—PRACTICAL LOCATION—AGREED FENCE—FINDINGS—COMMON BOUNDARY.—In an action to quiet title to a strip of land involving the location of a boundary, findings for the defendant as to the practical location thereof by an agreed fence are not inconsistent with a finding that the two tracts have a common boundary, the location of which is not found otherwise than as may be inferred from the practical location, which would control, even if the true line as originally existing were referred to as the common boundary.

ID.—SUPPORT OF EVIDENCE—LEGAL CONCLUSIONS—LACHES OF PLAINTIFF—ESTOPPEL.—Where the findings as to practical location by the agreed fence are supported by the evidence, and are sufficient to support the judgment for the defendant, findings which are mere legal conclusions from the practical location, as to the laches and estoppel of the owner under whom plaintiff claims, are immaterial, and need not be supported by the evidence.

ID.—EVIDENCE—DECLARATIONS OF OWNER IN HIS OWN FAVOR.—Evidence of the declarations of the lessor under whom plaintiff claims as owner, made in his own favor, was properly excluded.

ID.—TESTIMONY OF OWNER—IMPEACHING EVIDENCE—CONTRADICTORY STATEMENTS.—Where the owner under whom plaintiff claims had testified in brief that the fence was put up by him on his own land for his own convenience, and not as a boundary, and that there was no agreement in reference to it, it was proper to ask him if he had not at other times made statements inconsistent with his present testimony, the proper foundation being laid therefor, and if he denies them, evidence to show the contrary is clearly competent.

ID.—TEST OF CONTRADICTORY STATEMENTS.—The test of the admissibility of contradictory statements is whether the matters sought to be contradicted are material or immaterial.

ID.—STATEMENTS AFTER LEASE.—Where the testimony sought to be impeached was material the fact that the contradictory statements were made by the owner after a lease to plaintiff's assignor does not render them immaterial.

ID.—INSUFFICIENT FOUNDATION FOR IMPEACHMENT—STATEMENTS NOT RELATED TO WITNESS—IMMATERIAL ERROR.—Where the contradictory statements to which the testimony of an impeaching witness referred were not related to the witness sought to be impeached the statements were inadmissible, but where the testimony was allowed

"subject to the same objection, ruling, and exception" as former impeaching evidence of the same character properly admitted from another witness, and the defect was not urged by counsel, and probably escaped the notice of the court, and the denial of the admissible statements indicated that the other statements would have been denied if properly related to the witness, the error is immaterial.

APPEAL from an order of the Superior Court of Santa Barbara County denying a new trial. J. W. Taggart, Judge.

The facts are stated in the opinion.

Bicknell, Gibson & Trask, Dunn & Crutcher, and Canfield & Starbuck, for Appellant.

B. F. Thomas, for Respondents.

SMITH, C.—This is a suit to quiet title to a strip of land containing 54.97 acres, described in the complaint. Defendants had judgment, and plaintiff appeals from the order denying its motion for a new trial. The plaintiff, under a lease from Careaga to its assignor of date March 14, 1900, is lessee for a term of years of a tract of land owned by Careaga since about the year 1882. The defendants are the executors, widow, and devisees of John Newlove, deceased, who became the owner of the tract adjoining the Careaga tract on the north about the year 1880.

There is a fence on or near the common boundary between the two tracts, which was erected by Careaga in 1888. But it is claimed by the plaintiff that the true boundary is from 2.80 to 3.44 chains to the northward; and the land in controversy is the strip lying between this line and the fence.

It is claimed by defendants in their answer that in the year 1888, there being some controversy about the boundary, there was an agreement between Newlove and Careaga fixing the line where the fence was shortly afterward erected by the latter, and that this fence has ever since been acquiesced in by the owners of both tracts as the boundary. It is also claimed that it was part of the agreement that Newlove upon inclosing his land should pay half the cost of the fence; and accordingly the agreed one half value of the fence, two hundred and fifty dollars, was in the year 1898 paid to and accepted by Careaga.

On the issues thus raised the findings of the court are for the defendants. The court also finds "that plaintiff's alleged cause of action is barred by laches"; and "that plaintiff is estopped from claiming that said fence-line is not the dividing-line between the said lands in which it has an estate for years and the lands of defendants."

The points urged by appellant's counsel are: 1. That the court erred in ruling that Careaga could be examined as to statements made by him as to witnesses Tunnell and Martin subsequently to the date of Careaga's lease to plaintiff's assignor, and also in permitting Tunnell and Martin to testify to such declarations; 2. That the court also erred in excluding the declarations of Careaga in his own favor concerning the boundary of the Careaga ranch; 3. That the evidence was insufficient to justify the finding as to laches, or (4) as to estoppel; and 5. That the third finding conflicts with the findings from the fourth to the eleventh.

But with regard to the last objection, we do not see that this is the case. Findings 4 to 11 are the findings as to the practical location of the land by the parties in 1888. The third finding is simply to the effect that the two tracts have a common boundary, but the location of that boundary is not found otherwise than as it may be inferred from the practical location. Nor were it otherwise would the conflict be material, as the necessary effect of a practical location is in general to establish a different line from the true line as originally existing.

Nor are the findings as to estoppel and laches of any materiality. Presumably they are merely legal conclusions from the findings as to practical location. Otherwise, there would be no evidence to support them. But they may be stricken out without affecting the judgment, which is fully supported by the findings as to practical location. (*Dierssen v. Nelson*, 138 Cal. 397, 398; *Cavanaugh v. Jackson*, 91 Cal. 583; *Burris v. Fitch*, 76 Cal. 398; *Helm v. Wilson*, 76 Cal. 485; *White v. Spreckels*, 75 Cal. 616; *Columbet v. Pacheco*, 48 Cal. 397; *Cooper v. Vierra*, 59 Cal. 283; *Sneed v. Osborn*, 25 Cal. 626 et seq.)

The objection to Careaga's declarations in his own favor were also rightly sustained. (Code Civ. Proc., secs. 1849-1853; *Williams v. Harter*, 121 Cal. 52; *Taylor v. McConigle*, 120

Cal. 126-127; *People v. Blake*, 60 Cal. 510-511; dissenting opinion of McKee, J.; *Fischer v. Bergson*, 49 Cal. 297.)

This leaves us to consider only appellant's first point; which, however, involves several points which will require separate consideration. As to the questions to Careaga, we do not doubt they were admissible. Careaga had testified on his examination in chief that the fence was put up by him on his own land for his own convenience, and not as a boundary fence; and also that there was no agreement with reference to it. It was therefore competent to ask him whether he had not made at other times statements inconsistent with his present testimony. (Code Civ. Proc., sec. 2052.) As to the testimony of Martin, that also was admissible. Careaga had been asked specifically as to the statements to which Martin testified and had denied making them. The evidence was therefore clearly competent under the provisions of the section of the code cited above. It is indeed urged that where a witness is questioned as to a collateral matter his answer must be taken as conclusive, and that evidence to contradict it is not admissible; and it is claimed that the test of materiality is as stated in the case of *George v. State*, 16 Neb. 321, where it is said: "If the question put to a witness on the part of the state on his direct examination would have been objectionable as being no part of the state's case, then it is collateral, and the party asking it is bound by the answer and will not be permitted to cause another witness to contradict it." In applying this it is argued that Careaga's declarations, having been made after the date of the lease to plaintiff's assignor, were inadmissible, and therefore could not be proven. But the decision does not support this position; it refers to the original statements of the witness on his direct examination, which were material. So that the real test is whether "the matters sought to be contradicted were immaterial." (*Lake Erie etc. Co. v. Morian*, 140 Ill. 122; *Attorney-General v. Hitchcock*, 1 Ex. 99.)

But with regard to the witness Tunnell a serious question is presented. All that was asked Careaga with reference to him was whether he had a conversation at a time and place mentioned with Tunnell "in regard to the building of that fence to which you have referred in your direct examination"; and the statements to which Tunnell's testimony refers were not

related to him. These statements were therefore inadmissible, and the evidence having been objected to on the ground that sufficient foundation had not been made, their admission was error. (Code Civ. Proc., sec. 2052.) But this defect in the testimony of Tunnell is not urged by counsel, and probably escaped the attention of the court. The witness Martin had been previously examined and his testimony had been "objected to as incompetent, irrelevant, and immaterial, and also on the ground that sufficient foundation had not been laid"; and objection had been overruled and exception taken. But upon examination of Tunnell we find nothing as to the ruling of the court except the statement of plaintiff's attorney that the evidence was "subject to the same objection, ruling, and exception." This perhaps we may assume was assented to by the court; but it seems clear that the testimony of both witnesses was put in the same category by the plaintiff's attorney; and the court therefore could not be expected to observe the distinction. Also the statements made to Martin and Tunnell were in effect the same, and Careaga's denial of the former necessarily indicated that he would have denied the latter had the statement related to him. The error therefore, we think, was immaterial.

We advise that the order appealed from be affirmed.

Gray, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

Shaw, J., Angellotti, J., Van Dyke, J.

[L. A. No. 1594. Department Two.—January 17, 1905.]

W. H. HOLMES, Appellant, v. N. A. MARSHALL, W. H. JENKINS, and J. F. JENKINS, copartners as Marshall & Jenkins, and ANNIE J. JENKINS, Respondents.

EXECUTION—EXEMPTION OF LIFE-INSURANCE MONEY DUE BENEFICIARY.

—The exemption from execution under subdivision 18 of section 690 of the Code of Civil Procedure, of "all moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance, if the annual premiums paid do not exceed five hundred dollars," extends not only against the debts of the person whose life was insured, and who paid the premiums, but also to the debts of the beneficiary to whom it is payable after the death of the insured.

ID.—ESTATE OF DECEASED PERSON—SETTING APART POLICY TO WIDOW AS EXEMPT.—The proceeds of a policy payable to the administrators of a deceased husband may be set apart to the widow as being property exempt from execution, and such proceeds, when so set apart, are exempt from her debts.

ID.—ATTACHMENT OF EXEMPT POLICIES—DEPOSIT IN BANK—POWER OF COURT TO DISSOLVE ATTACHMENT.—The deposit in bank of the proceeds of life-insurance policies payable to the widow as beneficiary, and of the policy set apart to her as exempt from execution, does not remove the exemption; and the court has the power to dissolve the levy of the writ of attachment upon such deposits, as being exempt from execution, in an attachment suit upon a note signed jointly by the husband and wife.

APPEAL from an order of the Superior Court of Los Angeles County setting aside the levy of an attachment upon exempt property. D. K. Trask, Judge.

The facts are stated in the opinion.

Powers & Holland, for Appellant.

Morton, Houser & Jones, for Respondents.

COOPER, C.—This action is upon a promissory note, for one thousand dollars, dated October 5, 1899, signed by J. F. Jenkins and his wife, Annie J. Jenkins. J. F. Jenkins died intestate, and respondent Annie J. Jenkins is his surviving widow. After the action had been commenced a writ of attach-

ment was issued and levied upon \$1,020.57 on deposit in the Citizens National Bank of Los Angeles to the credit of respondent Annie J. Jenkins.

The court made an order after notice—and, on motion of respondents, setting aside the levy of said writ and dissolving it as to the money so on deposit with said bank. This appeal is from the order so made. The principal question is as to whether or not the said money was subject to the debts of respondent Annie J. Jenkins, or exempt from execution against her. At the time of his death J. F. Jenkins was the owner and holder of three fully paid up life-insurance policies upon his own life, two of which (one for \$99 and one for \$1,385) were payable to respondent Annie J. Jenkins, and one of which (for \$982.50) was payable to the estate of deceased, his administrators or executors. The estate of said deceased was duly probated, and the \$982.50 insurance collected, which constituted the entire estate, and of which there remained \$539.45 after paying costs and expenses of administration. This was set apart to the surviving widow, Annie J. Jenkins, as exempt from execution under section 1465 of the Code of Civil Procedure. The proceeds of all said policies were deposited by respondent Annie J. Jenkins in one account to her credit in said Citizens National Bank of Los Angeles. She drew against this account from time to time until the date of the levy of the attachment, when there remained the sum of \$1,202.57 to her credit in said bank.

“All moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance, if the annual premiums paid do not exceed five hundred dollars,” are exempt from execution. (Code Civ. Proc., sec. 690, subd. 18.)

The main contention of appellant is, that the exemption extends only against the debts of the person whose life was insured and who paid the premiums requisite to procure the insurance and keep it in force, and that such exemption does not continue after his death in favor of the beneficiary. In construing this statute, as in the construction of all statutes, it is the duty of the court to arrive at the intent of the legislature, if it can be done, from the language used in the statute. Statutes exempting property from execution are enacted on the ground of public policy for the benevolent purpose of

saving debtors and their families from want by reason of misfortune or improvidence. The general rule now is to construe such statutes liberally, so as to carry out the intention of the legislature, and the humane purpose, designed by the law-makers. (12 Am. & Eng. Ency. of Law, 2d ed., pp. 75-76, and cases cited; *In re McManus*, 87 Cal. 294;¹ *Spence v. Smith*, 121 Cal. 536.²) Bearing this rule in mind, let us see what the legislature has said as to this matter. It has said that where the annual premiums do not exceed five hundred dollars, the insurance moneys shall be exempt from execution. Here the annual premium did not exceed five hundred dollars. It has said that *all moneys* accruing or in any manner growing out of *any life insurance* shall be exempt from execution. The money here accrued and grew out of life insurance upon the life of deceased. After his death, no execution could issue against him. The words "exempt from execution" were clearly intended to apply to the moneys coming from the life insurance to the hands of the beneficiary. It is exempt from execution as to all strangers or parties who have no claim to it without any provision of statute. It was intended to exempt it from the debts of the party to whom it was payable and who procured title to it by the death of the insured. It was not the intention that the insured might die leaving a small insurance and a dependent family and that the insurance money should be subject to execution for the debts of the wife, even if she is the beneficiary named in the policy. The words "exempt from execution" mean exempt from any execution. The legislature mentioned no class of executions, and we are not at liberty to judicially insert a class. "Exempt from execution" includes the defendant Annie J. Jenkins and applies to plaintiff. We have no decision of this court upon the question, and the decisions of other courts do not furnish much assistance, because the statute under which each decision was made is different from ours. In Kentucky and Minnesota the statutes declare in effect that certain insurance benefits, reliefs, etc., "shall be exempt from execution, and shall not be liable to be seized, taken, or appropriated, by any legal or equitable process, to pay any debt or liability of a member." In both these states the fund or

¹ 22 Am. St. Rep. 250, and note.

² 66 Am. St. Rep. 62.

relief is held to be exempt from execution, whether against the original member or against any beneficiary who has been paid or is entitled to be paid any benefit falling within the class described in the statute. (*Schillinger v. Boes*, 85 Ky. 357; *Brown v. Balfour*, 46 Minn. 68; *First National Bank v. How*, 65 Minn. 187.) It seems, at least, doubtful as to whether or not these decisions properly construe the statutes of these states. The decisions in other states, particularly in New York, hold similar language to create an exemption only as to the member or insured.

In New York the language of the statute is, that such funds shall be exempt "from execution, and shall not be liable to be seized, taken or appropriated by any legal or equitable process to pay any debt or liability of such deceased member." (*Bolt v. Keyhoe*, 30 Hun, 619.) The Kentucky and Minnesota cases are criticised by Freeman in his work on Executions (3d ed., vol. 2, sec. 234b), but the author says in speaking of the language of the statutes in those states: "If these statutes stopped with the words 'exempt from execution' there would be no doubt of the exemption in favor of the beneficiary, but the additional words in the statute indicate that the legislature had in mind merely the debts or other liabilities of members of the association in question, and hence that, after the benefit was received by a person other than a member it would be subject to the usual laws relating to executions." In our code the statute stops with the words "exempt from execution." Under our statute necessary household and kitchen furniture is exempt from execution, and if the wife succeeds to such furniture it is equally exempt as to her debts. The farming utensils or implements of husbandry of the judgment-debtor are exempt, and if the son should take them under the will of his father, following his father's occupation, they would still be exempt as to the son's debts. Equally true as to the insurance money in controversy herein. If it had come to J. F. Jenkins in his lifetime, it is conceded that it would have been exempt as to his debts. It came to his wife as his beneficiary and is equally exempt as to her debts.

As to the policy payable to, and collected by the estate, the estate was the beneficiary, and the money was for the reasons before stated exempt from execution. It was therefore assets of the deceased exempt from execution, and was properly

set apart to the widow, as being so exempt. (Code Civ. Proc., sec. 1465; *Estate of Miller*, 121 Cal. 353.) The administrator or executor is not the owner of any part of the estate. He, in his official character, only holds it in trust for the parties entitled to it, subject to the purposes of administration. The title to the insurance money came to respondent Annie J. Jenkins through the estate and under the order setting it apart, and vested the title in her as effectively as if she had been named as the beneficiary of the policy. We can see no reason why the insurance money coming to her directly as beneficiary should be exempt from execution, and not that coming to her indirectly through the estate and the order setting it apart. In either case it is exempt from execution. In one case the instrument of life insurance gives her the title, in the other the law gives it to her. The statute provides that all property exempt from execution shall be set apart for the use of the surviving husband or wife. (Code Civ. Proc., sec. 1465.) If it is exempt from execution before being set apart, it does not cease to be so the moment it is set apart. The widow takes the family allowance by order of the court. After it is paid to her, it cannot be seized on execution for her prior debts, and diverted from the support of the family. The principle is fully discussed in regard to a homestead set apart for the family in *Keyes v. Cyrus*, 100 Cal. 322.¹ It was there held that the provision for setting apart exempt property including a homestead was for the protection and support of the family. The court said: "The authority given to the court in the first part of section 1465 to set apart for the family 'all the property exempt from execution, including the homestead selected,' implies that the property when set apart is exempt from execution. . . . A homestead may be set apart to the widow, even though the estate be insolvent, and the property so set apart constitute the entire estate of deceased; but if the homestead thus set apart to her could be immediately taken in execution by one of her creditors it would fail to be available for her use or support, and it might happen that her creditor would fare better than a creditor of the decedent whose money had perhaps been used to purchase the very property so set apart."

In *Barnum v. Boughton*, 55 Conn. 117, it was held that

money paid to the widow as an allowance for her support through the probate court could not be taken or attached by one of her creditors. The court said: "She could neither ask nor receive it for the payment of her debts; the probate court could not grant it for that purpose. . . . If one allowance can be intercepted so can every other; for if the door is opened for one creditor it cannot be closed against any; and the entire estate might thus be diverted from its legal destination. The law will not permit the instant necessities of the widow, and the ultimate rights of the creditors of the estate, to be postponed, in its name, to the demands of her creditors." So in this case the court will not allow the insurance money, which is exempt from execution as to the creditors of the estate, to be taken by the creditors of the widow. It is equally exempt as to them.

Appellant contends that by the deposit of the money in the bank, the money lost its identity, and that thereafter the bank owed Annie J. Jenkins the money. That the debtor thus voluntarily parted with the money, which was exempt, and acquired in lieu thereof a credit due by the bank. Such construction would seem to be unreasonable, and no authority is cited which supports it. It is true that in one sense by the deposit the relation of debtor and creditor was created as between the bank and Mrs. Jenkins, but she put the exempt money in the bank. She regarded it as money in the bank. She expected to and did draw it as she needed it. The bank did not give her the identical pieces of money that she deposited, but it gave her as she drew upon it money equal in value and kind. She was not required to keep the money buried or in her stocking in order to have it remain exempt. If the appellant's theory is correct she could not have paid a five-dollar grocery bill with a twenty-dollar piece, receiving fifteen dollars in change, without the risk of having the fifteen dollars attached. The law does not require such absurdity. The cases cited by appellant arose under the United States pension laws, and are not in point. The section of the revised statute construed provides: "No sum of money due or to become due to any pensioner, shall be liable to attachment," etc. The courts have correctly held that the section only protected the money while due or in course of transmission to the pensioner. Money due or to become due is designed to protect the amount

of the pension until it reaches the hands of the pensioner. It is then no longer money due or to become due. Our statute exempts the money, and although deposited in the bank it is still money and protected. It has not lost its identity because of the fact that the identical coins or bills deposited are not to be returned. Respondent probably never saw any coins or bills, but took the checks which the insurance company gave her, as evidence that it had the money for her, and deposited them with the bank, having the amounts credited in her bank-book as evidence that she had the money in the bank.

In *Hibernia Savings and Loan Society v. City and County of San Francisco*, 139 Cal. 205,¹ it was held that the checks or orders drawn upon the treasurer or assistant treasurer of the United States, payable on demand, are not merely obligations of the United States, but solvent credits subject to taxation. The court said: "The orders were simply a convenient mode of payment of the obligation. They were, for all practical purposes, the money itself." So in the case at bar the credit in the bank is, for all practical purposes under the exemption laws, to be regarded as the money itself. Respondent had the right to have the levy set aside upon the exempt property. Section 556 of the Code of Civil Procedure provides that the writ may be discharged when the same was improperly or irregularly issued. This was not a dissolution of the writ of attachment, but an order setting aside the levy as to the exempt property. It would be strange if a court were so impotent that it could not set aside the erroneous levy of its own writ upon exempt property. Any other rule would compel the injured party to bring a suit for damages, which not only would lead to delay, but might in the end prove futile. Courts have power over their own process, and to set aside a levy of a writ of attachment or execution upon exempt property. (Freeman on Executions, sec. 271; Ency. of Plead. & Prac., p. 579, and cases cited; *Sandburg v. Papineau*, 81 Ill. 446.)

It follows that the order should be affirmed.

Gray, C., and Smith, C., concurred.

¹ 96 Am. St. Rep. 100.

For the reasons given in the foregoing opinion the order is affirmed. McFarland, J., Henshaw, J., Lorigan, J.

Hearing in Bank denied.

[L. A. No. 1805. Department One.—January 18, 1905.]

ETTA ESTELLE BERRY, Respondent, v. JOHN WARD BERRY, Appellant.

DIVORCE—NEGLECT TO PROVIDE—FINDINGS NOT SUPPORTED—ABILITY NOT PROVEN—UNCORROBORATED EVIDENCE OF PLAINTIFF.—A divorce cannot be granted on the uncorroborated evidence of either of the parties, and where the wife seeks a divorce on the ground of the willful neglect of her husband to provide for her the necessities of life, he having the ability to do so, and his ability was shown only by the uncorroborated evidence of his wife, and willful neglect was disproved by the testimony for the husband, the findings in favor of the plaintiff are unsupported.

ID.—PUBLIC INTEREST.—The public has an interest in every suit for divorce; and doubts as to the right to a divorce should be resolved against it rather than for it.

ID.—RESIDENCE OF PLAINTIFF.—Taking all the circumstances of the case together, the evidence fails to show a clear case of *bona fide* residence on the part of the plaintiff so as to entitle her to bring the action.

APPEAL from a judgment of the Superior Court of San Bernardino County. Benjamin F. Bledsoe, Judge.

The facts are stated in the opinion of the court.

Will D. Gould, and J. E. Bates, for Appellant.

Henry W. Nisbet, for Respondent.

VAN DYKE, J.—This is an action for divorce. Plaintiff and defendant were married in Middlesex County, Massachusetts, October 18, 1898. The plaintiff alleges in her complaint that for more than one year preceding the commencement of the action she has been and is now a resident of the county of San Bernardino in the state of California.

The complaint contains two counts. In the first it is charged that the defendant for more than a year immediately preceding the commencement of the action had willfully neglected and failed to provide plaintiff with the common necessities of life, by reason of his profligacy, idleness, and dissipation.

In the second count it is charged that for more than a year immediately preceding the commencement of the action the defendant had willfully neglected and failed to provide plaintiff the common necessities of life, he having the ability so to do, and had compelled her during said period to live upon the charity of her relatives and friends. The defendant, a resident of Massachusetts, where the parties were married, employed attorneys to defend the action, through whom a verified answer to the complaint was filed. In his answer he denied that the plaintiff had resided in the state of California for more than one year before the commencement of the action, or that at that time she was a *bona fide* resident of the state of California, and alleges that "The plaintiff moved from the commonwealth of Massachusetts into the state of California for the purpose of obtaining a divorce from this defendant for a cause not allowed by law in said commonwealth," and denies that he willfully or at all neglected or failed to provide for plaintiff the common necessities of life or that he did so by reason of profligacy, idleness, dissipation, or at all, and denies that he willfully or at all neglected or failed to provide the plaintiff with the common necessities of life, or had compelled her to live upon the charity of her relatives or friends, or any of them; but, on the contrary, he alleges that he has at all times faithfully kept his marriage vows, and conducted himself toward the plaintiff as a faithful husband should, and alleges that the plaintiff has willfully been absent from the defendant for more than one year from the date of filing the complaint, without any cause or justification, and without the consent of the defendant.

The court found that the plaintiff had been for more than one year preceding the filing of the complaint a *bona fide* resident of the county of San Bernardino, state of California, and that the defendant, for more than one year prior to the filing of the complaint,—to wit, the twenty-ninth day of June, 1901,—had willfully neglected and failed to provide the plaintiff with the common necessities of life, he, the said defendant,

having during all of said time the ability so to do, and that plaintiff had been compelled to live upon the charity of her relatives and friends. The court, however, found in favor of the defendant in reference to the charge of profligacy, idleness, and dissipation. Judgment was accordingly entered granting a divorce to the plaintiff January 9, 1902.

The defendant, through his attorneys, made a motion for a new trial on various grounds, among others the insufficiency of the evidence to justify the findings, and errors of law, which motion for a new trial was thereafter submitted and denied June 9, 1902. Thereafter, on July 3, 1902, notice of appeal from the judgment, and also from the order denying defendant's motion for a new trial, was served and filed on the part of the defendant.

Appellant, through his counsel, has filed a brief on the appeal, and at the October term of this court in Los Angeles argued and submitted the cause. The respondent has not filed any brief and failed to appear at the hearing of the cause on the argument.

From the record of the evidence contained in the statement on motion for a new trial it appears that the plaintiff was the only witness present at the trial of the cause. All the other evidence was by deposition of the parties in the east, including the father and mother of the plaintiff. The judge who tried the cause in the court below, in summing up the evidence in the case, says: "The only serious question in my mind is whether or not the wife by the burden of proof has shown that her husband is able, or was able during the period of the marriage, to provide her with the common necessities of life, being firmly convinced as I am that he did not provide her with the common necessities of life. The testimony shows that he went to Boston every day and returned every night; we are led to infer that he worked while he was there; he testifies that he did work, and carried on his furniture business. There is no testimony which would support a finding of idleness or profligacy or dissipation on his part that I can see in the case. The only question is, Was he able to provide his wife with the common necessities of life? Our supreme court, and I think very properly, and in keeping with what I would consider to be a natural law, have said that if a man is able to work, but cannot get work, that fact in itself does not give the

wife a ground of divorce. He must have property; he must have something whereby he can provide her with the common necessities of life. . . . The only testimony I have on that point is the testimony of the wife to the effect that he was continually promising but failed to provide; and it seems to me under all the testimony in the case—and I feel a little reluctant to arrive at that conclusion—but it seems to me under all the testimony in the case that the preponderance of the evidence is to the effect that he was able to provide her with the common necessities of life, but that he failed and neglected to do so, and for that reason I shall order judgment in favor of the plaintiff on the second ground or cause of action.” The law, however, declares in very explicit terms that no divorce can be granted upon the uncorroborated statement of either of the parties to the action. (Civ. Code, sec. 130.) And doubts should be resolved against divorce instead of for it.

“The marriage relation is the foundation of all society. It is not to be severed on slight grounds or for trivial causes; the policy of the law, therefore, is against granting divorces. Unlike other cases, in an action for divorce judgment cannot be rendered for the plaintiff on the default of the defendant, even upon a verified complaint; nor can it be granted upon the uncorroborated statement, admission, or testimony of the parties. (*Hatton v. Hatton*, 136 Cal. 353.) While an action to obtain a decree dissolving the relation of husband and wife is nominally an action between two parties, the state, because of its interest in maintaining the same, unless good cause for its dissolution exists, is an interested party. It has been said by eminent writers upon the subject that such an action is really a triangular proceeding, in which the husband and wife and the state are parties. . . . The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for divorce.” (*Deyoe v. Superior Court*, 140 Cal. 476.¹) Upon the statement of the learned judge of the court below that the only testimony with reference to the failure to provide was that of the wife, the judgment of the court below should have been for the defendant. But, in the testimony of the plaintiff herself, she says: “I never knew him to withhold money from me when he had it, and I never knew him to have money around

¹ 98 Am. St. Rep. 72.

him." And there is no evidence in the transcript showing that the defendant did not do the best he could under his circumstances to support his wife.

At the time of the marriage the defendant was twenty-three and the plaintiff about seventeen. The defendant was just starting in as a partner in a business of repairing furniture in Boston, and was obliged to borrow from his sister in starting his business twenty-five hundred dollars, and the evidence is all to the effect that he was an industrious, temperate man, and was never idle when he could get work. His mother and sister, it seems, did not view the marriage favorably, and the sister testifies that she met Mr. Allen, the father of the plaintiff just before the marriage, and says, "I told him I did not think that my brother could support his daughter in the way his daughter wanted to be supported, and he said, 'I don't care if Ward has not one cent. I can afford to support them if necessary.' " After they were married they went to housekeeping; his folks and her folks assisted in furnishing the house, and her father and mother and their adopted boy went to board with the parties from November until the next March, when the plaintiff and her mother went to Limerick, in Maine, where they remained until the latter part of the following October, 1899. Plaintiff's father in his deposition says: "I think my wife and I lived with Mr. Berry from November until the next March. On no occasion did I make complaint to Mr. Berry in regard to the board." In the transcript appear several letters from the plaintiff to the defendant while she remained at Limerick, of the most endearing character. Soon after their return from Limerick the plaintiff was about to be confined, and the physician who was consulted, it seems, advised taking her to a hospital of which he had charge. The deposition of the physician was introduced on behalf of the plaintiff at the trial. In this he says:—

"Q. I understand you recommended the removal of the plaintiff to the Frost Hospital?—A. I did.

"Q. Did you attend her then?—A. I did.

"Q. Did you render any bill to any one for medical services on this basis?—A. I did.

"Q. To whom?—A. The husband.

"Q. For attendance at the house and hospital both?—A. Covering all attendance on the wife.

"Q. Did the husband pay this bill?—A. He did.

"Q. Did he pay the entire bill?—A. To the best of my knowledge he did.

"Q. Was the bill paid promptly?—A. Reasonably so. Yes, sir. As doctors' bills are paid."

In the deposition of Mrs. Allen, taken in Massachusetts, and read on the trial, she says: "I asked Mr. Berry if he was willing that his wife should go to the hospital and he answered no, that her place was at her home." And it appears from defendant's deposition, as well as otherwise, that at that time the home of the parties was a suitable place for plaintiff's confinement. However, the physician thought he could attend to her better at the hospital; hence the removal there. Mrs. Allen, plaintiff's mother, further in her testimony says:—

"Q. How long was your daughter at the hospital?—A. Two and a half weeks, I think that was the time I paid for.

"Q. You paid the hospital bill for the time she was there?—A. Yes, sir."

In this connection there was produced on behalf of the defendant during the examination of the plaintiff herself on the stand, a letter which the defendant had written to her while she was in California, of which the following is a copy:—

"MALDEN, MASS., June 11, 1900.

"MY DEAR WIFE:

"Although I much dislike to refer to this matter you will recollect that your mother made complaint that since I had not paid the bills of Doctor Leeds, she herself was compelled to and did pay it. Yet I was surprised June 9, 1900, to learn from Dr. Leeds that she had paid him nothing whatever. Accordingly on the same date I paid his account, amounting to thirty dollars, as indicated by the copy of his receipt which I herewith mail to you. This I do so that you may not be misled by certain false statements and by various misrepresentations that have been made. You may rest assured of my constant and ever endearing love for you. And you ought to learn very much from this particular instance of misrepresentations here disclosed.

Ever yours,

"J. WARD BERRY."

Accompanying this is a copy of the bill of Dr. Leeds referred to, and which Dr. Leeds, as already shown, testified had been paid by the defendant Berry.

The particular grievance of the plaintiff against the defendant is based upon what she supposed was his neglect to treat her properly and pay the bills while she was at the hospital during her confinement. In her cross-examination she says: "I wrote him a letter and told him that if he could not take care of me through my confinement and pay my bills that I should not live with him another day. That is all I wrote him.—Q. Is that the real cause of your leaving him? —A. That is the real cause. Because I did not care anything about him after his abuse of me; abuses I went through and suffered all through my confinement and before that."

In the defendant's deposition he says: "I was married to the plaintiff at Malden, Massachusetts, October 18, 1898; our domestic relations were happy; I have never had any bad habits; I have always lived a plain and unquestionable life; I have never been a profligate, idle, or dissipated, and never willfully or at all neglected or refused or failed to provide plaintiff with the common necessities of life." Again he says, after he earned some money as a clerk, "I put that money in the furniture business; I was in the furniture business from October 4, 1897, until the spring of 1900; the money I borrowed from my sister, Mrs. Cressey, I used in the furniture business; the furniture business was not a paying venture. It left me in debt other than to my sister; I had two or three hundred dollars in promissory notes I was obliged to take up; I was about three hundred dollars in debt six months before I gave up the furniture business in the spring of 1900."

The defendant testifies as follows in reference to his wife going to the hospital: "At the time of my wife's confinement the house was all furnished—five rooms; and my wife was provided with all that she needed in the way of food, clothing, and other comforts; the day that my wife went to the hospital the doctor sent for me to go down to his office to see him; he told me that my wife was in a critical condition, and that he did not care to take upon himself the responsibility of caring for her at the house, and that he wished I would consent to have her go to the hospital; I immediately went back and told my wife she had better go; my wife said she did not want to leave her home and she did not want to leave me; after she went to the hospital I packed the furniture up and had it moved over to Mrs. Annie Green's (her aunt) to be stored

there; the same day that my wife went to the hospital she asked as a special favor to have the things and household goods packed up and stored at her aunt's house until she was able to go to housekeeping again; the child was born March 14, 1900, and died March 17th, the following Saturday, and was buried March 20th, and my wife stayed in the hospital one and a half weeks after the death of the baby; while she was at the hospital I called to see her every evening after I was admitted during the time she was there." It also appears from bills presented in his deposition that he paid the baby's funeral expenses. He further testified that all of his earnings went to the support of his family after his marriage, and there is nothing in the evidence in reference to his ability to provide for his family inconsistent with his own testimony.

In his deposition he also testifies that the plaintiff in May, 1900, left Massachusetts with her mother and went to California for the purpose of getting a divorce. The plaintiff in her testimony denied that she ever told him she was going to California to get a divorce, but the circumstances surrounding the case seem to corroborate the defendant's statement. She testifies that she deserted him, and just before starting to California she dropped him a note as follows: "As I am going right away and auntie is soon to move, I sent your things over to your house. All except two carpets and the sideboard and two tables. Those I sold to pay my bills with, or help pay them. The other things are yours, the silver, that is the solid, is in your valise, and the other is in the half barrel which you had better take care of right away. Your clothes are in the packing-box. I shall be many miles away when you receive your things and I thought I would see you had your things all right before I started." In her testimony she says: "My parents have been taking care of me since I have been in California; I have an explanation to offer as to those affectionate letters that have been introduced in evidence while I was living at Limerick. I was a very proud girl, and at that time I was very sick and needed sympathy, and I was too proud to go to my mother for it and so in that feeling I wrote to him. . . . And I did, as a matter of fact, think a great deal of Mr. Berry at that time; I did, I thought quite a little of him." Further she says, "I have not asked him for any money since I came to California."

“Q. Did he want you to come to California?—A. I did not ask him.—Q. You came right away on your own responsibility? A. I did, yes, sir.—Q. And you never have asked him for any money for your support since then?—A. No, sir.”

The evidence on the part of the defendant, which is not contradicted in any material respect, is a complete answer to the plaintiff's complaint of want of care and attention on the part of the defendant during her sickness and confinement at the hospital, and this in fact, according to her own statement, is her principal grievance on the charge of failure to provide on the part of the defendant the common necessities of life.

Aside from the want of evidence to support the finding on the merits of the action, it appears very plainly that the plaintiff was not a *bona fide* resident of this state so as to entitle her to bring the action, even if a proper ground of divorce existed. According to the testimony of the plaintiff her home at Highlands was with her parents, and in the deposition of her father, Mr. Allen, taken in Massachusetts and used in her behalf on the trial, he says: “I returned from California a year ago last November and my wife returned from California over six months ago. I returned for the purpose of protecting my business here in Boston. . . . I never voted there and do not know that I am a citizen of California. I am a registered voter at Chelsea and voted there at the last state election.” It would appear from this, therefore, that the father of the plaintiff was not a citizen of California but a temporary resident, at the most, in Highlands in this state, and there is nothing to show that the plaintiff had a residence independent of that of her parents. There is nothing to show that the defendant ever was in California. His residence is in Boston. It is true she says she deserted him and came to California. Taking all the circumstances together, to say the least, it does not establish a clear case of a *bona fide* residence on the part of the plaintiff. But inasmuch as the evidence utterly fails to support the finding upon the merits, it is not necessary to pass upon the question of residence.

The judgment and order denying a new trial are reversed.

Angellotti, J., and Shaw, J., concurred.

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ACCOUNTING. See *Mortgage*, 7-9.

ALIMONY. See *Divorce*, 7-9.

APPEAL.

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2. **MOTION FOR NEW TRIAL—DISTINCT PROCEEDINGS.**—A motion for a new trial is an issue of a distinct proceeding, and is to be heard upon an independent record, distinct from the record upon which the judgment depends. (*Id.*)
3. **APPEAL FROM ORDER DENYING NEW TRIAL—REVIEW—SUFFICIENCY OF COMPLAINT.**—The sufficiency of the complaint can only be considered upon an appeal from the judgment, and is not reviewable upon appeal from an order denying a new trial. (*Frey v. Vignier*, 251.)
4. **APPEAL FROM JUDGMENT—REVIEW.**—Where an appeal, though taken within proper time after the entry of the judgment against the appellant, was taken more than four years after its rendition, the objection that the evidence does not support the decision of the trial court cannot be considered. (*Baum v. Roper*, 116.)
5. **ORDER AFTER JUDGMENT—REFUSAL TO RELIEVE FROM DEFAULT—FAILURE TO SERVE NOTICE IN TIME—MERITS OF APPEAL.**—An order refusing to relieve the appellant corporation from default in failing to serve its notice of intention to move for a new trial within the statutory time is appealable as an order after judgment, and a motion to dismiss an appeal therefrom must be denied. The merits of the appeal cannot be inquired into and determined upon such motion. (*Steen v. Santa Clara Valley Mill and Lumber Company*, 564.)
6. **CHANGE IN ORDER FOR JUDGMENT—ABSENCE OF BILL OF EXCEPTIONS.**—A change in the order for judgment without setting aside or modifying the first order, is not available upon the judgment-roll alone, in the absence of a bill of exceptions to such change. (*Rooney v. Gray*, 753.)

APPEAL (Continued).

7. **JUDGMENT FOR DAMAGES—ABSENCE OF INJUNCTION—APPELLANTS NOT PREJUDICED.**—The appellants cannot be prejudiced by a judgment for damages warranted by the evidence, and cannot complain that no injunction was awarded against the appellants. (*Id.*)
8. **JUDGMENT-ROLL—ABSENCE OF EXCEPTIONS OR EVIDENCE—FINDING.**—Upon an appeal taken upon the judgment-roll, without any statement or bill of exceptions, the judgment cannot be reversed where no fatal error appears on the face of the judgment-roll. A finding of fact upon such appeal must be held conclusive if there is no contradictory finding upon the subject. (*Miller & Lux v. Enterprise Canal and Land Company*, 652.)
9. **VOLUNTARY DISMISSALS OF ACTION—WRITTEN REQUESTS TO CLERK—MOTION TO VACATE—NON-APPEALABLE ORDERS.**—The several voluntary dismissals of an action on the part of the plaintiffs therein by separate written requests to the clerk for such dismissals, without any order of court therefor, are not appealable or subject to review upon appeal, and an order denying a motion to vacate or set them aside is not appealable. (*Alpers v. Bliss*, 565.)
10. **ORDER DENYING MOTION TO VACATE JUDGMENT OF DISMISSAL.**—The final judgment of dismissal being appealable, an order denying a motion to vacate and set aside such judgment is not appealable. (*Id.*)
11. **REVIEW UPON APPEAL FROM JUDGMENT—ORDER STRIKING OUT CROSS-COMPLAINT.**—Upon appeal from the judgment of dismissal an order striking out a cross-complaint of the defendant is deemed excepted to under section 647 of the Code of Civil Procedure, and may be reviewed under section 956 of the same code, as an order affecting the judgment. (*Id.*)
12. **APPEAL FROM JUDGMENT UPON CROSS-COMPLAINT—ABSENCE OF EVIDENCE AND EXCEPTIONS—PRESUMPTIONS.**—Upon appeal by the plaintiff from a judgment rendered in favor of defendant upon its cross-complaint, where the record does not contain the evidence, and shows no objections or exceptions to evidence, all intendments are in favor of the judgment, and it must be presumed that sufficient evidence was introduced to justify the findings and judgment (*Abner Doble Company v. Keystone Consolidated Mining Company*, 490.)
13. **VARIANCE BETWEEN CROSS-COMPLAINT AND FINDINGS—CURE OF DEFECT BY DECISION—WAIVER OF OBJECTION—PRESUMPTION.**—Where the cross-complaint claimed damages in a specified sum for breach of a contract with plaintiff, guaranteeing the efficiency of an air-compressor which plaintiff altered, and which was rendered worthless by the alteration, the damage alleged being for the value of its use in the condition in which it was before the alteration, and the court found damage in a less sum for expense incurred by defendant toward making the alteration, and for the cost of restoring it

APPEAL (Continued).

to its original condition, the variance and defect in the pleading must be deemed cured by the decision; and upon an appeal from the judgment, without the evidence, it must be presumed that the damage found was duly proved at the trial, and that objection to the evidence on account of the variance, which might have been remedied by amendment of the cross-complaint was waived by the plaintiff. (*Id.*)

14. **NON-PAYMENT OF NOTES—DEFECT IN CROSS-COMPLAINT SUPPLIED BY AVERMENTS OF PLAINTIFF.**—The failure of the cross-complaint to aver non-payment of notes described therein is not fatal nor ground for reversal of the judgment, where it appears from plaintiff's complaint and bill of particulars, a copy of which was set forth in the answer of defendant, and from plaintiff's answer to the cross-complaint, that such notes were credited as payments upon plaintiff's account, without any claim of any item of payment to be applied upon such notes. Defects in a pleading may be cured by averments in the pleading of the opposite party. (*Id.*)

See *Certiorari*; *Estates of Deceased Persons*, 14, 26, 27, 31; *Findings*, 1, 6; *Judgment*, 1; *New Trial*, 3, 8; *Partition*; *Place of Trial*, 1.

APPROPRIATIONS. See *Constitutional Law*.

ASSAULT AND BATTERY.

1. **CIVIL ACTION—AMENDED ANSWER—SELF-DEFENSE—ORDER STRIKING OUT—CURE OF ERROR—ALLOWANCE UPON REQUEST BEFORE JURY—PRESUMPTIONS.**—In a civil action for damages for an assault and battery, where the defendant, without leave of court filed an amended answer setting up a plea of self-defense, which was stricken out on motion on the day of trial, but was allowed to be filed on request made before the jury, any error in striking out the answer was cured by such request; and it cannot be held that the defendant was injured in the eyes of the jury by having to make such request before them, but it must be presumed that the jury did their duty and decided the question of fact under the instructions of the court upon the pleadings as they then were. (*Risdon v. Yates*, 210.)
2. **EVIDENCE—PLEA OF GUILTY IN CRIMINAL CASE—ADMISSION—QUALIFYING DECLARATION EXCLUDED—PREJUDICIAL ERROR.**—A plea of guilty in a criminal case in regard to the same assault and battery is not conclusive, and does not estop the defendant in a civil action therefor. It has merely the effect of an oral admission, and is governed by the rules applicable thereto. Where the plea of guilty was introduced by the plaintiff from the justice's docket, it was prejudicial to refuse to allow evidence of all that was said by the defendant when he made the plea qualifying the admission, where the evidence was sharply conflicting as to whether the plaintiff was or was not the aggressor in striking the first blow. (*Id.*)

ASSAULT AND BATTERY (Continued).

3. **AMENDMENT TO OBLIATE OBJECTION TO EVIDENCE—OFFER NOT RENEWED—ESTOPPEL.**—Where an amendment was allowed upon defendant's request to obviate an objection to evidence bearing on the question of who was the first aggressor, the offer of which was not renewed after the amendment, he cannot be permitted to ask this court to review the original ruling. (Id.)
4. **INAPPLICABLE INSTRUCTIONS.**—Instructions, though abstractly correct, should not be given if they are inapplicable to the evidence and may mislead the jury. (Id.)
5. **DAMAGES—SUFFICIENCY OF COMPLAINT.**—A complaint for assault and battery which alleges that the defendant assaulted the plaintiff and kicked him in the face and on the body, and that he "thereby seriously wounded and bruised the plaintiff, to his damage" in a specified sum, is to be construed as importing that by reason of the acts complained of the plaintiff sustained damage to that amount, and is sufficient as to the damages. (*Pennington v. Caughey*, 10.)

See Criminal Law, 8-13.

ASSIGNMENT.

1. **ACTION UPON JUDGMENT BY ASSIGNEE—PLEADING—OWNERSHIP—LEGAL CONCLUSION.**—In an action upon a judgment by an assignee thereof, where the complaint alleges an assignment of the judgment, and also alleges that plaintiff is now the owner and holder of the judgment, the latter allegation is of a mere legal conclusion or presumption from the fact of assignment, and is unnecessary; and an answer denying each allegation presents an issue only as to the fact of the assignment. (*Curtin v. Kowalsky*, 431.)
2. **PROOF OF ASSIGNMENT—GENERAL DESCRIPTION.**—An assignment by the judgment creditor to the plaintiff of each and every judgment entered of record in his name carries the judgment sued upon, which was entered in his favor prior to the assignment, in the absence of evidence of any previous assignment or transfer thereof. Such assignment was admissible in evidence upon proof of its execution. (Id.)
3. **EFFECT OF PRIOR ASSIGNMENT—EXECUTED CONTRACT—CONSIDERATION—SUBSEQUENT ASSIGNMENT—EVIDENCE.**—The prior assignment to the plaintiff carried the legal title to the judgment with the right to sue thereon, whether it was or was not supported by a consideration. It was an executed contract, and there could be no revocation or subsequent assignment thereof which could affect the legal title of the plaintiff. All evidence to show that plaintiff's assignment was not for value, and that the subsequent assignment was for a valuable consideration, was irrelevant and immaterial. (Id.)
4. **ASSIGNMENT IN TRUST—EQUITABLE RIGHTS OF SECOND ASSIGNEE NOT INVOLVED.**—Although the assignment to the plaintiff was in

ASSIGNMENT (Continued).

trust for the assignor, and the assignor could convey his equitable interest therein, yet where the only issue was as to the fact of the assignment, without any plea in abatement, the rights of the second assignee cannot be adjudged, and the plaintiff may maintain the action upon his legal title. The second assignee, though a *bona fide* purchaser for value, did not acquire a title superior to that of the plaintiff as prior legal assignee. (Id.)

5. **NOTICE OF ASSIGNMENT—RULE OF CAVEAT EMPTOR.**—It was not necessary for the plaintiff to put his assignment on file or to give notice of it to other persons who might be about to take a second assignment. The rule of *caveat emptor* applies in such case; and if the assignor has no legal title, the subsequent assignee will take none, whether he has notice or not. (Id.)

See Evidence.

ATTACHMENT. See Execution, 2.

ATTORNEY AND CLIENT. See Judgment, 3; New Trial, 1.

BANKS.

1. **INSOLVENCY—ASSESSMENT FOR UNPAID STOCK—AUTHORITY OF DIRECTORS—PROVISIONS OF CIVIL CODE—ELECTION TO SUE.**—The directors of a savings bank which has been adjudged insolvent at suit of the attorney-general, on notice of the bank commissioners, may, for the purpose of liquidating its indebtedness and paying its creditors, levy an assessment upon the unpaid capital stock for a sufficient sum to pay the creditors in accordance with the provisions of the Civil Code relative to assessments; and if not paid may elect to proceed by suit to recover the amount of the same. (Union Savings Bank of San Jose v. Leiter, 696.)
2. **BY-LAW NOT EFFECTIVE AGAINST CREDITORS—STATUTE PART OF CONTRACT.**—A by-law of the bank forbidding the directors to levy an assessment of a greater amount than thirty per cent of the capital stock, except by a two-thirds vote of the stockholders, may be attacked by creditors without notice, and must be construed in connection with the provisions of the statute authorizing the levy of a sufficient assessment to pay the creditors of the insolvent bank, and is ineffective so far as conflicting with the statute, which entered into and became a part of the subscriber's contract with the corporation. (Id.)
3. **STATUTE OF LIMITATIONS.**—If the statute of limitations may be deemed applicable to the case, it does not begin to run against the right to enforce an assessment upon the stockholders on account of unpaid stock of the insolvent bank until the levy has been made and the directors have elected to proceed by action. (Id.)
4. **EFFECT OF UNPAID ASSESSMENT—RUNNING OF STATUTE—POWER OF DIRECTORS—NEW ASSESSMENT.**—Where nothing was ever paid

BANKS (Continued).

upon a former assessment levied upon the unpaid capital stock, and it was declared rescinded and waived, though it may be conceded that the statute of limitations began to run against it, yet the assessment not being paid the power of the directors in liquidation to levy assessments under subdivision 1 of section 332 of the Civil Code was not exhausted, and the statute of limitations as to a new assessment did not commence to run prior to its levy. (Id.)

5. **PAYMENTS TO CREDITORS UNDER JUDGMENTS—CAPITAL STOCK.**—Payments made by the defendants to creditors of the bank under judgments against him by such creditors, upon defendant's liability to them under section 322 of the Civil Code, cannot be considered as payments made upon the capital stock. (Id.)
6. **REPEAL OF BANK COMMISSION ACT—JUDGMENT AND POWER OF DIRECTORS NOT AFFECTED.**—The repeal of the Bank Commission Act on March 2, 1903, without any saving clause as to pending litigation, could not affect a judgment theretofore given in pursuance of its provisions decreeing a bank insolvent and requiring it to proceed under the management of its directors to close up its affairs and liquidate its indebtedness. Nor could such repeal affect the power of the directors to levy and collect an assessment upon the unpaid capital stock under the Civil Code. (Id.)

BEACH AND WATER LOTS. See Execution, 9, 10.

BILL OF EXCEPTIONS.

PRESENTATION FOR SETTLEMENT—MISTAKE AS TO TIME—EXCUSABLE INADVERTENCE.—A mistake of one day in giving eleven days' notice by plaintiff of the presentation of a bill of exceptions for settlement after the service of proposed amendments thereto does not make the settlement thereof erroneous where a proper case for relief under section 473 of the Code of Civil Procedure was established by affidavits and by all the circumstances of the case clearly showing that the mistake was the result of an excusable inadvertence on the part of plaintiff's attorney. (*Kaltschmidt v. Weber*, 596.)

See Appeals, 6, 8; Criminal Law, 19-23; New Trials, 8-10.

BOARD OF EXAMINERS. See Receivers.

BONA FIDE PURCHASERS.

1. **ACTION TO CANCEL DEEDS—UNRECORDED DEED TO PLAINTIFF—RECORD OF SUBSEQUENT DEEDS UNDER GRANTOR—BURDEN OF PROOF—FINDING AGAINST EVIDENCE.**—In an action to cancel deeds, where the plaintiff asserts title under a prior unrecorded deed, and the defendants claim under recorded deeds resting upon a subsequent recorded deed from plaintiff's grantor, under which the grantees took no title as such, the burden of proof is upon each of the

BONA FIDE PURCHASERS (Continued).

defendants not only to show that his conveyance was executed and recorded, but also to show that he was a *bona fide* purchaser for value, without notice of plaintiff's rights under his prior deed; and in the absence of proof by the defendants that they took without such notice, a finding to that effect is against the evidence. (Bell v. Pleasant, 410.)

2. **AVERTMENT OF COMPLAINT—ANTICIPATION OF DEFENSE—BURDEN OF PROOF NOT CHANGED.**—The fact that the complaint unnecessarily anticipated a possible defense, and alleged that the second grantee and each of his successors, including the last grantee, took their respective deeds with knowledge of the fact that the land was the property of the plaintiff, which was denied by the answer, does not require the plaintiff to prove such averments or change the burden of proof from the defendants to show that they were *bona fide* purchasers for value without notice. Mere proof of value does not change the burden from the defendants in such case. (Id.)
3. **CASE OVERRULED.**—The case of *Smith v. Yale*, 31 Cal. 184, upon the subject of the burden of proof under an unrecorded deed, must be deemed overruled. (Id.)
4. **CASES DISTINGUISHED—EQUITABLE TITLE—POSITION OF LEGAL TITLE—PRESUMPTION.**—Cases relative to the burden of proof upon a plaintiff who rests upon an equitable title or right, to show notice of his equity to a subsequent grantee of the legal title for value, have no application to a case where the legal title is in the plaintiff, and his grantor has no title left to convey, and the defendants must show a change of legal condition, which cannot be presumed in favor of a second grantee from plaintiff's grantor. (Id.)
5. **PRIOR TRUST-DEED AS SECURITY.**—The fact that prior to plaintiff's title the technical title was in trustees under a trust-deed to secure a debt, which was kept in force by renewals of the debt, is not material to the respective rights of the plaintiff and defendants, all of whose claims to ownership are alike subject to the trust. (Id.)
6. **EVIDENCE—INTENTION OF SECOND GRANT AS MORTGAGE—REBUTTAL OF CLAIM—DECLARATIONS OF GRANTOR.**—Where the plaintiff claimed that the deed from plaintiff's grantor to the second grantee was intended as a mortgage to secure a debt, and conveyed no title, the declarations of the grantor to the plaintiff at and subsequent to the conveyance were admissible in favor of the defendant grantees, with respect to that particular question, to rebut such claim. (Id.)

See Assignment, 4, 5; Estoppel, 1.

BOUNDARY.

1. **QUIETING TITLE—PRACTICAL LOCATION—AGREED FENCE—FINDINGS—COMMON BOUNDARY.**—In an action to quiet title to a strip of land involving the location of a boundary, findings for the defend-
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BOUNDARY (Continued).

ant as to the practical location thereof by an agreed fence are not inconsistent with a finding that the two tracts have a common boundary, the location of which is not found otherwise than as may be inferred from the practical location, which would control, even if the true line as originally existing were referred to as the common boundary. (*Western Union Oil Company v. Newlove*, 772.)

2. **SUPPORT OF EVIDENCE—LEGAL CONCLUSIONS—LACHES OF PLAINTIFF—ESTOPPEL.**—Where the findings as to practical location by the agreed fence are supported by the evidence, and are sufficient to support the judgment for the defendant, findings which are mere legal conclusions from the practical location, as to the laches and estoppel of the owner under whom plaintiff claims, are immaterial, and need not be supported by the evidence. (*Id.*)
3. **EVIDENCE—DECLARATIONS OF OWNER IN HIS OWN FAVOR.**—Evidence of the declarations of the lessor under whom plaintiff claims as owner, made in his own favor, was properly excluded. (*Id.*)
4. **TESTIMONY OF OWNER—IMPEACHING EVIDENCE—CONTRADICTORY STATEMENTS.**—Where the owner under whom plaintiff claims had testified in brief that the fence was put up by him on his own land for his own convenience, and not as a boundary, and that there was no agreement in reference to it, it was proper to ask him if he had not at other times made statements inconsistent with his present testimony, the proper foundation being laid therefor, and if he denies them, evidence to show the contrary is clearly competent. (*Id.*)
5. **TEST OF CONTRADICTORY STATEMENTS.**—The test of the admissibility of contradictory statements is whether the matters sought to be contradicted are material or immaterial. (*Id.*)
6. **STATEMENTS AFTER LEASE.**—Where the testimony sought to be impeached was material the fact that the contradictory statements were made by the owner after a lease to plaintiff's assignor does not render them immaterial. (*Id.*)
7. **INSUFFICIENT FOUNDATION FOR IMPEACHMENT—STATEMENTS NOT RELATED TO WITNESS—IMMATERIAL ERROR.**—Where the contradictory statements to which the testimony of an impeaching witness referred were not related to the witness sought to be impeached the statements were inadmissible, but where the testimony was allowed "subject to the same objection, ruling, and exception" as former impeaching evidence of the same character properly admitted from another witness, and the defect was not urged by counsel, and probably escaped the notice of the court, and the denial of the admissible statements indicated that the other statements would have been denied if properly related to the witness, the error is immaterial. (*Id.*)

BROKER. See Contract, 1-4.

BUILDING AND LOAN ASSOCIATION. See Mortgage, 11.

BURGLARY. See Criminal Law, 19-23.

CERTIORARI.

ORDER OF POLICE JUDGE—SUMMONING OF TRIAL JURY BY SHERIFF—
JURISDICTION—WAIVER OF ERROR—REMEDY BY APPEAL.—The writ of *certiorari* or review will not lie to annul an order of a judge of the police court of the city and county of San Francisco, made under section 230 of the Code of Civil Procedure, for the summoning of a trial jury by the sheriff in a case of misdemeanor. Such order was within the jurisdiction of the police judge, and if any error was involved in the making of it the defendant might waive such error, and if it was not waived he had an adequate remedy by appeal. (*Wittman v. Police Court of the City and County of San Francisco*, 474.)

See Contempt; Municipal Corporations, 2, 9.

COMMUNITY PROPERTY. See Husband and Wife, 1, 2, 9.

CONSTITUTIONAL LAW.

VOID SPECIAL APPROPRIATION.—A special appropriation act which contains several items which are not for a single purpose is void, as being in violation of section 34 of article IV of the constitution. (*Sullivan v. Gage*, 759.)

See Criminal Law, 3, 4; Execution, 6; Extradition, 2; Mechanics' Liens, 4; Municipal Corporations, 1, 4-6, 10-12; Trial.

CONTEMPT.

1. **CERTIORARI—CONTEMPT PROCEEDINGS—FORMER JUDGMENT UPON HABEAS CORPUS.**—Upon *certiorari* to review a judgment imposing a fine for contempt of the superior court in refusing to answer questions propounded to the petitioner by the grand jury, a former judgment of this court upon *habeas corpus* to review contempt proceedings for refusal to answer the same questions before the grand jury is not *res adjudicata* or a bar to the subsequent proceedings upon *certiorari*. (*Rogers v. The Superior Court of the City and County of San Francisco*, 88.)
2. **VOID ORDER—QUESTIONS BEFORE GRAND JURY—MATTER OF INDICTMENT—FRAUD—SELF-CRIMINATION.**—An order of the superior court requiring the petitioner to answer certain questions before the grand jury in relation to a matter that had been disposed of by such grand jury and was no longer pending before that body, and the manifest object of which questions was merely to make the petitioner a witness against himself before the grand jury, to show that he had aided in the accomplishment of a felony, is void, and cannot form the basis of a subsequent order of court punishing the petitioner for contempt in disobeying its former order. (*Id.*)

CONTEMPT (Continued).

3. **CONSTRUCTIVE CONTEMPT—SUFFICIENT AFFIDAVIT REQUIRED.**—Where a contempt is committed outside the presence of the court an affidavit of the facts forming the basis of judicial action must show on its face a case of contempt, and if it does not the court has no jurisdiction, and the order of contempt is void. (Id.)

CONTRACT.

1. **VENDOR AND PURCHASER—BROKER'S COMMISSION—EXPIRATION OF CONTRACT.**—A real-estate broker having a right to a commission on a sale of real estate for finding a purchaser must in order to be entitled to the commission perform the duty of finding the purchaser within the time limited in the contract or an extension thereof by the owner. The fact that he made efforts to sell the property within the time limited, and first called it to the attention of the party who made the purchase, will not entitle him to a commission if he failed to procure the purchaser within the time limited, if the delay was not caused by the negligence, fault, or fraud of the owner. (*Ropes v. John Rosenfeld's Sons*, 671.)
2. **CONSTRUCTION OF CONTRACT—TIME LIMIT.**—Where the owner on Sunday gave a broker the right to sell the property on certain terms, "subject to prompt reply," which meant that the broker had all of the following day to bring a purchaser, the owner could not withdraw the offer before the expiration of the following day; but the procuring of a purchaser on Tuesday was beyond the time limit, and where the owner sold directly to the same purchaser on that day commissions were not recoverable by the broker. (Id.)
3. **SALE NOT RATIFIED—COMPROMISE OF COMMISSIONS—TIME LIMIT NOT WAIVED.**—The fact that the purchase money was paid on Tuesday through the broker, and, there being a dispute as to the right to a commission, the money was receipted for by the owner, less one-half of the commission, by way of compromise, while the right to the other half was left in dispute, does not show a ratification of the sale or a waiver of the time limit as respects the residue of the commission. (Id.)
4. **ACTION FOR COMMISSION—PLEADING—COUNT FOR WORK AND LABOR—OMISSION IN FINDING—EVIDENCE.**—Where in the action for the agreed commission there was a second count in the complaint for work and labor, and all of the evidence was directed to the alleged contract and the sale under it, the failure of the court to find on the second count will not justify a reversal. (Id.)
5. **LETTERS—PROPOSAL—QUALIFIED ASSENT.**—In order to constitute a binding contract by letters there must be a proposal squarely assented to. A qualified acceptance is a rejection of the proposal, and is a new proposal, and if the new proposal is not accepted no contract is constituted. (*Four Oil Company v. United Oil Producers*, 623.)

CONTRACT (Continued).

6. **SALE OF OIL—ACTION FOR BREACH OF CONTRACT—EVIDENCE—INADMISSIBLE LETTERS.**—In an action for breach of an alleged contract to purchase oil, letters containing merely a proposal by plaintiff to sell the oil on specified terms, and a qualified acceptance of the terms by the defendant, adding a material new term, that the proposed quality of the oil must be at a fixed temperature, were properly excluded from evidence. (Id.)
7. **ACTION FOR SERVICES—COMPROMISE OF LITIGATION—CONFLICTING EVIDENCE—REASONABLE CAUSE FOR BELIEF—SUPPORT OF FINDING.**—In an action for services alleged to have been rendered for defendants in effecting a settlement and compromise of litigation, where the court found that such defendants did not engage the services of plaintiff, nor employ him in the settlement and compromise, nor request him to perform the services, and the evidence is conflicting as to whether the defendants had reasonable cause to believe that plaintiff was working for their benefit and expected pay from them, or as to whether they had reasonable cause to believe, and did believe, that plaintiff acted solely as agent for the opposite party to the compromise, the finding is supported, and cannot be disturbed upon appeal. (Merrill v. Gunnison, 544.)
8. **PROVINCE OF TRIAL COURT—CONFLICTING INFERENCES.**—It is the province of the trial court not only to weigh testimony which is in direct conflict, but also to determine between conflicting inferences and deductions which may reasonably be drawn from the direct testimony given and the circumstances proven. (Id.)
9. **FINDING—ABSENCE OF REQUEST—IMPLIED REQUEST NEGATIVED.**—The finding that the services were not rendered at the request of the defendants includes the negation of an implied as well as of an express request. (Id.)
10. **CONSTRUCTION OF FINDINGS—IMMATERIAL OMISSIONS.**—The findings must be so construed as to sustain the judgment where such construction is reasonable; and where it clearly appears therefrom that the defendants are not liable for the plaintiff's services it was unnecessary for the court to find whether or not they were rendered to or for some other person, or whether or not the plaintiff voluntarily rendered the services for the defendants without expectation of remuneration from them. (Id.)
11. **ACTION FOR COMMISSIONS—SECURING CONTRACTS WITH FOREIGN GOVERNMENT—PAST AND FUTURE SERVICES—SUFFICIENCY OF COMPLAINT—TRIAL—OBJECTION UPON APPEAL.**—In an action by the plaintiff corporation to recover commissions under an alleged contract which recited past services rendered by plaintiff through its agents in Guatemala in securing contracts for the defendant corporation with the government of Guatemala, and that such contracts are likely to be awarded, and agreeing to pay five per cent commissions on all moneys received under any contract or contracts awarded to the defendant, either direct or through any other person or com-

CONTRACT (Continued).

tractor, said commissions to be in full compensation for past and future services to be rendered by the corporation plaintiff, which "agreed to continue its efforts to secure the said contracts, and to do everything in its power towards this end,"—where the complaint alleged that the contracts were thereafter awarded to defendant, and that one half of the commissions remained unpaid on amounts received thereafter, the mere failure to allege that plaintiff complied with its agreement to continue its efforts to secure the contracts, etc., is not ground for reversal upon appeal, where there was no demurrer, and the case was tried upon the theory that the fact of such continued efforts was in issue. [Beatty, C. J., dissenting.] (*Parke & Lacey Company v. San Francisco Bridge Company*, 534.)

12. **ISSUE AS TO WANT OF CONSIDERATION—EVIDENCE—REBUTTAL—CORRESPONDENCE.**—Where the defendant had pleaded want of consideration for the alleged contract, and had introduced evidence tending to show that the plaintiff had done nothing in the matter of procuring the contracts, it was proper in rebuttal to admit evidence of a correspondence of plaintiff with its agents in Guatemala, the letters to whom were shown to the defendant and in great part dictated by it, which correspondence covered a period both before and after the date of the contract, and also to admit testimony that other letters were written pertaining to one of the contracts which were in court subject to plaintiff's inspection, though not formally introduced in evidence. (*Id.*)
13. **GENERAL QUESTION AS TO CONSIDERATION—RULING NOT PREJUDICIAL.**—It was not prejudicial error to sustain plaintiff's objection to a general question asked by defendant as a witness, whether the defendant ever received any consideration for the written agreement, where the witness had already testified that plaintiff had not paid or given defendant anything before or at the time of the agreement, and it appeared the only question before the court touching the consideration was as to plaintiff's services in procuring the contracts from Guatemala. (*Id.*)
14. **PAST SERVICES AS CONSIDERATION FOR CONTINGENT COMPENSATION UNDER WRITTEN CONTRACT—DOCTRINE INAPPLICABLE.**—The general doctrine that a past executed consideration supports only an implied agreement to pay in *presenti* on request, and will not support an agreement to pay in future, has no application where the agreed compensation was to be contingent upon the securing of contracts, and by the written agreement of the parties they merely put into permanent written form what they finally agreed upon as to the future contingent compensation. (*Id.*)
15. **CONSIDERATION FOR PROMISE.**—The promise of the lessees to replace the machinery in the destroyed kiln was a sufficient consideration for the promise of the lessor to rebuild it. (*Frey v. Vignier*, 251.)

See Assignment, 3; Corporations; Master and Servant.

CONTRIBUTION. See Negotiable Instruments, 2-4.

CONVERSION.

1. **TROVER—CONVERSION OF HAY—NONSUIT.**—A motion for a nonsuit was properly granted in an action of trover for the alleged conversion of hay belonging to the plaintiff where the evidence, construed most strongly against the defendant, failed to connect the defendant with the taking or use of the hay. (*Martin v. Barry*, 540.)
2. **PRIOR ACTION BY DEFENDANT—ABSENCE OF AFFIDAVIT—TAKING BY CONSTABLE.**—Plaintiff's proof of a prior judgment for the defendant in a former action of claim and delivery brought by the defendant against plaintiff's assignor, in which a constable seized the property which then belonged to plaintiff, without any evidence that an affidavit in replevin was filed, on which a direction might have been indorsed to the constable to take the property, and without any proof that the constable took it by defendant's direction, it appearing merely that he put a keeper in charge, and never turned the property over to the defendant or to anyone, whatever cause of action it may show in favor of plaintiff against the constable, fails to connect the defendant therewith. (*Id.*)
3. **APPEAL—"TRANSCRIPT."**—Where there is nothing in the justice's docket to show that the former judgment was appealed from, the caption of a "Transcript on Appeal offered in evidence" is not evidence that there was an appeal. (*Id.*)

CORPORATIONS.

1. **CONTRACT FOR SALES OF STOCK—ACTION FOR COMMISSIONS—FINDING—CONFLICTING EVIDENCE.**—In an action against a corporation for commissions upon sales of its stock, under a contract to pay commissions for all sales made by the plaintiff or by his assistance, a finding made upon conflicting evidence that plaintiff assisted in making a sale to a particular person must be accepted upon appeal as correct. (*Boland v. Ashurst Oil, Land and Development Company*, 495.)
2. **FULL COMMISSION UPON PURCHASE MONEY—COMPROMISE OR NEGLECT OF CORPORATION AFTER SALE.**—The plaintiff was properly allowed a full commission upon the purchase money for a sale made through his solicitation, although the purchase was closed with an officer of the corporation upon payment to him of one fourth of the purchase money. The corporation could not deprive plaintiff of his commission after the sale either by agreeing with the purchaser to accept a less amount or by neglecting to collect from him the price at which it was sold. (*Id.*)
3. **ILLEGAL CONTRACTS BY PRESIDENT WITH HIMSELF INDIVIDUALLY—TRUST RELATION—UNTENABLE ACTION TO ENFORCE INDORSED NOTES.**—One who is president and director of a corporation occupies a fiduciary and trust relation thereto; and where he purchased its notes outright, and caused the corporation, by himself as president,

CORPORATIONS (Continued).

to become an indorser thereof to himself individually, guaranteeing the payment of the notes without the authority, knowledge, or approval of the corporation, he cannot maintain an action to enforce the express contracts of indorsement, the making and enforcement of which are equally prohibited by law. (*Pacific Vinegar and Pickle Works v. Smith*, 352.)

4. **BREACH OF TRUST—FAIRNESS AND ADVANTAGE TO CORPORATION NOT CONSIDERED.**—Such contracts are a breach of trust, and voidable at the mere election of the corporation, if not absolutely void. In an action to enforce them the court will not permit any investigation as to the honesty or fairness of the contracts, nor permit the trustee to show that they were not detrimental, or that they were advantageous to the corporation. (*Id.*)
5. **FINDING AGAINST EVIDENCE—EXPRESS RATIFICATION NOT SHOWN—WANT OF KNOWLEDGE OF FACTS.**—A finding that there was a ratification and approval of the contracts of indorsement of the notes by the corporation is not sustained in so far as it involves an express ratification, where the evidence fails to show that the corporation was in possession of all the facts and acted after knowledge thereof. (*Id.*)
6. **IMPLIED RATIFICATION NOT SHOWN—CONCEALMENT OF FACTS.**—A ratification implied from acquiescence and acceptance of benefits is not shown, notwithstanding the secretary of the corporation joined with the president in making the contracts, where the evidence shows that all of the facts were concealed from the directors by both of them, and that, without the knowledge of the directors, the corporate name was affixed to renewal notes, and the liability continued, the existence of which they did not know. (*Id.*)
7. **CONCEALED KNOWLEDGE OF SECRETARY NOT IMPUTABLE TO CORPORATION.**—Although it was the duty of the secretary, as well as that of the president, to inform the directors as to the facts, yet where the secretary combined with the president to conceal the facts, and falsely represented them to the directors, the president cannot invoke the doctrine that the knowledge of the secretary is conclusively imputable to the corporation, in support of an implied ratification. (*Id.*)
8. **SECRET COMMISSION RECEIVED BY OFFICER—ACTION AGAINST EXECUTORS—EVIDENCE—MOTIVES OF WITNESS ASSAILED—REBUTTAL.**—In an action by a corporation against the executors of a deceased officer and manager, to recover a secret commission received by him upon sale of its property, where the motives of a witness for the plaintiff, who testified to his sharing a commission with such officer, were assailed by the executors' counsel for having concocted the story after the officer's death, in revenge for disallowance of a claim by him against the estate, it was proper, in rebuttal of such charge, to admit letters addressed by the witness to the officer in his lifetime making the same claim, and, for the same limited

CORPORATIONS (Continued).

purpose, to admit other letters and declarations of the witness in relation to sharing the commission, made prior to the death or to the presentation of the claim against the estate. (*California Electric Light Company v. California Safe Deposit and Trust Company*, 124.)

9. **INFLUENCE UPON JURY—EQUITY CASE—ADVISORY VERDICT—REVIEW UPON APPEAL.**—If the jury were influenced in their verdict by the evidence admitted before them for a limited purpose, this would not justify a reversal of the judgment against the accused in a case in equity. In such a case the verdict is at most only advisory to the court; and where the court acted upon its own judgment, and, in addition to approving the special verdict, made and filed its own findings and decision, the correctness of the decision of the court, and not of the verdict as rendered by the jury, is the question to be determined upon appeal. (*Id.*)
10. **FINDING AS TO AMOUNT—INFERENCE FROM EVIDENCE.**—Where there is evidence tending to sustain the finding of the jury and court as to the amount and value of the stock received by the defendant as a secret commission, it was for the court to determine the proper construction of the testimony and the inference of fact to be drawn therefrom; and the fact that the evidence might warrant a different inference does not justify this court in disturbing the finding for want of evidence. (*Id.*)

See *Banks*; *Good-Will*, 4-11; *Municipal Corporations*; *Negotiable Instruments*, 1-3; *Receivers*, 1; *Summons*, 2.

COSTS.

1. **TRANSCRIPTION OF TESTIMONY UNDER ORDER OF COURT.**—Where the transcript of the testimony was written up under a previous order of the court, directing that the expense should be borne equally by both sides, the prevailing party is entitled to include the amount paid by him for such expense as part of the costs in the case. (*Bell v. Pleasant*, 410.)
2. **IMPROPER ALLOWANCE OF COSTS—BLANK SPACE IN JUDGMENT—HARMLESS ERROR.**—Where the plaintiff recovered less than three hundred dollars, the court should not have allowed costs in his favor; but where the judgment appealed from shows a blank space after the provision therefor, the error is harmless. (*Boland v. Ashurst Oil, Land etc. Co.*, 405.)
3. **ACTION TO ANNUL DEED.**—An action to annul a deed made by a testator in her lifetime to the defendant, brought by the heirs at law who were devisees under the will, is an action involving the title to the land in question, and where plaintiffs recover part of the property sued for, they are entitled to costs as a matter of right, under section 1022 of the Code of Civil Procedure. (*Gibson v. Hammang*, 454.)

COSTS (Continued).

4. **MOTION TO AMEND DECREE.**—Where the decree for the plaintiffs improperly disallowed costs to the plaintiffs, a motion may be properly made by the plaintiffs, under section 663 of the Code of Civil Procedure, to amend the conclusions of law and to vacate that part of the judgment disallowing costs, and to enter judgment for costs in their favor. (Id.)

See *Mechanics' Liens*, 3; *Receivers*, 2, 3; *Water and Water-Rights*, 7.

CRIMINAL LAW.

1. **TRANSCRIPTION OF TESTIMONY—DUTY OF PHONOGRAPHIC REPORTER—MANDAMUS.**—It is not the duty of the phonographic reporter in a criminal case to transcribe the testimony for the use of the defendant without the payment or tender of fees therefor, unless the court itself orders the testimony written up; and in the absence of such order or tender of fees *mandamus* will not lie to compel the transcription. (*Richards v. The Superior Court of the City and County of San Francisco*, 38.)
2. **DISCRETION OF COURT.**—It is wholly within the discretion of the court whether or not it will order the evidence written up at the expense of the county; and the court cannot be compelled by *mandamus* to fix a time within which the phonographic reporter shall transcribe his notes, unless there is a legal duty resting upon the reporter to transcribe the same. (Id.)
3. **PREVIOUS CONVICTION—INCREASED PUNISHMENT—CONSTITUTIONAL LAW—AGGRAVATED OFFENSE.**—The increased punishment on account of a previous conviction of a former offense, as provided in section 666 of the Penal Code, and the proceedings to be had upon arraignment under section 988 of that code, and upon verdict, in reference to such prior conviction, under section 1158 of that code, are not violative of any provision of the constitution, state or federal. The increased punishment is not for the prior conviction, but solely for the aggravation of a second offense, which merits a greater punishment. (*People v. Coleman*, 609.)
4. **DISCRIMINATION—DUE PROCESS OF LAW.**—Where the defendant was arraigned and tried in the same manner as any other defendant who has suffered a previous conviction is arraigned and tried, he is not discriminated against or deprived of due process of law. (Id.)
5. **PREVIOUS CONVICTION A QUESTION OF FACT—PLEADING—ISSUE—PROVINCE OF JURY.**—The previous conviction is a question of fact material to the aggravated offense for which the defendant is tried, which must be pleaded, and where issue is joined thereupon, either by plea of not guilty or by standing mute, which amounts to the same thing under the Penal Code, it must be proven as any other material fact upon the trial of the case; and it is the province of

CRIMINAL LAW (Continued).

- the jury to pass thereupon, under section 1158 of the Penal Code. (Id.)
6. **CONFESSION OF PREVIOUS CONVICTION—RIGHTS OF DEFENDANT.**—The defendant has it in his power to avoid bringing the fact of previous conviction before the jury by confessing the same by his plea at the time of arraignment before the court. (Id.)
 7. **SENTENCES FOR DISTINCT CRIMES—CREDITS FOR GOOD BEHAVIOR.**—Where the accused was convicted of two distinct crimes, and was sentenced at the same time therefor for two distinct terms, one to commence upon the termination of the other, the credits for good behavior for which the prisoner is entitled under the act of 1889 are to be computed on each term separately, and not as though the two sentences constituted but one term. (*Ex Parte Clifton*, 186.)
 8. **ASSAULT WITH DEADLY WEAPON—INTENT TO ASSAULT THIRD PERSON.**—Where the accused made an assault with a deadly weapon, consisting of a loaded pistol, upon the prosecuting witness, under a mistake as to the person, and with intent to assault another person with the same weapon, the intent is transferred from such other person to the person so assaulted, and the accused was properly convicted of an assault with a deadly weapon upon him. (*People v. Wells*, 138.)
 9. **PRESUMPTION OF UNLAWFUL INTENT—SUPPORT OF VERDICT—JURISDICTION UPON APPEAL.**—The pointing of a loaded pistol at the prosecuting witness, under the circumstances shown, was such an act as would raise a presumption that it was done with an unlawful intent; and there being evidence to support the verdict that the weapon was pointed at the prosecuting witness with a guilty intent, this court will not disturb the verdict. The jurisdiction of this court in criminal cases is limited to questions of law alone. (Id.)
 10. **EVIDENCE—DISCHARGE OF PISTOL AFTER ASSAULT.**—Evidence was admissible to show that the defendant discharged the pistol after the termination of the assault therewith for the purpose of showing that it was loaded. (Id.)
 11. **POSSESSION OF BRASS KNUCKLES—HARMLESS ERROR.**—It was error to permit the arresting officer to testify that he found brass knuckles, besides the pistol, upon the person of the defendant; but the irregularity is not of sufficient importance to justify a reversal. (Id.)
 12. **TESTIMONY OF DEFENDANT—INSTRUCTION—CAUTION TO JURY.**—Where an instruction of the court cautioning the jury as to the testimony of the defendant was in effect the same as the instruction approved in the case of *People v. Cronin*, 34 Cal. 204, the judgment will not be reversed on account of it. (Id.)
 13. **ERRONEOUS INSTRUCTION AS TO PROOF OF INSANITY.**—Insanity is required to be established only by a mere preponderance of evi-

CRIMINAL LAW (Continued).

- dence; and it was erroneous for the court to instruct the jury that it must be "clearly established by satisfactory proof." (Id.)
14. **MARKING COLT TO PREVENT IDENTIFICATION BY OWNER—SLITTING OF EARS—CUSTOMARY USE.**—One who marks a colt belonging to another person by slitting its ears, with the intent thereby to prevent identification thereof by the true owner, is guilty of a felony under section 357 of the Penal Code, regardless of whether such mark might be legally adopted under the provisions of the Political Code, or is customarily used to indicate a vicious animal, and not ownership. (People v. Strombeck, 110.)
15. **MATTERS NOT PART OF OFFENSE—PROVINCE OF JURY—QUESTION OF INTENT.**—It is not material to the offense that the mark placed upon the colt is not of a character usually adopted to indicate ownership, or that it may not accomplish the purpose of actually preventing identification; though these are matters that may be properly weighed by the jury in determining the intent with which the marking was done. (Id.)
16. **CONSTRUCTION OF SECTION—"MARKS."**—The word "marks," as used in section 357 of the Penal Code, is not to be limited to the placing on the animal of some "conventional artificial indication of ownership," but the provision was designed to protect the owners of animals by making it a crime for one to in any way mark the animal of another with the intent thereby to prevent identification. (Id.)
17. **SUPPORT OF VERDICT—CONFLICTING EVIDENCE AS TO INTENT.**—Notwithstanding the evidence was without conflict as to the customary use of the slitting of ears of horses to indicate a vicious animal, and not ownership, yet where the evidence shows that where the slitting was done the defendant knew that the colt belonged to the true owner, and was not an estray, and the evidence of the circumstances of the case conflicted with the testimony of the defendant upon the question of intent to prevent identification by such owner, the verdict of guilty of the offense charged will not be disturbed upon appeal. (Id.)
18. **CHARACTER OF MARK USED—REFUSAL OF REQUESTED INSTRUCTIONS—CHARGE OF COURT.**—It was not error to refuse requested instructions as to the character of the mark used, where the instructions given by the court were as liberal as any that the defendant was entitled to in that regard. (Id.)
19. **BURGLARY—DECREE OF OFFENSE—SUFFICIENCY OF EVIDENCE—BILL OF EXCEPTIONS—REVIEW UPON APPEAL.**—Where the defendant was convicted of the crime of burglary in the second degree, and the only question raised upon appeal is as to whether the verdict is contrary to the evidence, and the judgment-roll and bill of exceptions show affirmatively that the bill of exceptions does not contain all of the evidence, and the bill of exceptions purports only to state that the testimony given at the trial included evidence

CRIMINAL LAW (Continued).

directed solely to the time of the offense, and tending to show burglary of the first degree, other questions as to the insufficiency of the evidence to support the verdict are not raised, and cannot be reviewed upon the appeal. [Beatty, C. J., Henshaw, J., and Lorigan, J., dissenting.] (People v. Coulter, 66.)

20. **VERDICT FAVORABLE TO DEFENDANT.**—The defendant cannot complain that the verdict was more favorable to him than the evidence warranted. (Id.)
21. **PRESUMPTIONS AS TO EVIDENCE IN BILL OF EXCEPTIONS.**—Though the general rule is, that the bill of exceptions is presumed to contain all of the evidence, even if it does not so state, where it purports to give the substance of the evidence, or what it tends to show; yet this rule does not apply where the bill by its terms is limited to the statement of a portion of the material evidence included in the testimony given at the trial. In such case the presumption is only as to the completeness of the record as to the evidence upon the particular matter to which by its terms the bill is limited; and it must be presumed that the omitted evidence was sufficient to sustain the verdict of the jury in all other respects. [Beatty, C. J., Henshaw, J., and Lorigan, J., dissenting.] (Id.)
22. **BURDEN UPON DEFENDANT—DUTY OF DISTRICT ATTORNEY.**—Where the defendant's motion for a new trial is denied, it devolves upon him to present a draft of a bill of exceptions purporting, at least, to contain a fair statement of the evidence material to the question which he desires to have determined upon appeal. Though it is the duty of the district attorney to see that the evidence is complete as to all such matters, it is not his duty to prepare a bill of exceptions; and his duty is confined to proposing such amendments in regard to the particular matter set forth in the bill as will show the truth as to those matters. [Beatty, C. J., Henshaw, J., and Lorigan, J., dissenting.] (Id.)
23. **PREPARATION OF BILL OF EXCEPTIONS—DUTY OF JUDGE.**—A bill of exceptions need not in any case state all of the evidence word for word. As to those matters concerning which there is no dispute, the bill should merely contain the briefest statement as to its effect; and as to the matters as to which the dispute exists, the statement should be sufficiently elaborate to show the facts. It is the duty of the judge settling the bill to strike out all unnecessary matter, and to see that it is no more lengthy than the necessities of the case require. (Id.)
24. **RECEIVING STOLEN GOODS—MISCONDUCT OF DISTRICT ATTORNEY—STATEMENT OF OFFENSE NOT PROVED—ORDER GRANTING NEW TRIAL.**—Where the defendant was convicted of the crime of receiving certain stolen goods a new trial was properly granted on the ground of misconduct of the district attorney in telling the jury in effect that the defendant was guilty of another offense,—viz., the keeping of a place for the habitual reception of stolen

CRIMINAL LAW (Continued).

goods,—which was not proved in the case, and only rested on excluded evidence of the sale of other goods. (*People v. Sing Lee*, 190.)

25. **IMPROPER REFUSAL OF INSTRUCTION—DISALLOWED EVIDENCE.**—It was error for the court to refuse a requested instruction to the jury not to consider any proposed evidence which has been offered and disallowed by the court. (*Id.*)
26. **FRAUDULENT CLAIM AGAINST COUNTY—INSUFFICIENT INDICTMENT.**—An indictment for the presentation of a false and fraudulent claim against the county, under section 72 of the Penal Code, which does not set forth the particular acts and facts which make the claim fraudulent, and does not allege wherein it is false, is insufficient, in not conforming substantially to the requirements of sections 950, 951, and 952 of the Penal Code. The allegation that the claim is fraudulent is of a mere conclusion of law, and presents no issuable fact. (*People v. Mahony*, 104.)
27. **CASE OVERRULED.**—The case of *People v. Carolan*, 71 Cal. 195, overruled as to the sufficiency of an indictment under section 72 of the Penal Code, which merely follows the language of that section. (*Id.*)
28. **OBTAINING MONEY BY FALSE PRETENSES—SUFFICIENCY OF EVIDENCE, HOW REVIEWED—APPEAL FROM JUDGMENT AND ORDER DENYING NEW TRIAL.**—Conceding, without deciding, that the sufficiency of the evidence to support a verdict of guilty of obtaining money by false pretenses cannot be reviewed upon appeal from the order refusing a new trial, for want of including the grounds of the motion in the bill of exceptions, yet where the defendant moved the court, when the prosecution rested, to instruct the jury to acquit, and excepted to the ruling denying the motion, the ruling involved the whole merits of the case, and necessarily affected the judgment, and the sufficiency of the evidence for the prosecution may be reviewed upon the appeal from the judgment, upon the bill of exceptions in relation to such ruling. (*People v. Ward*, 786.)
29. **CORPUS DELICTI—ELEMENTS OF CRIME.**—The elements of the crime of obtaining money by false pretenses necessary to establish the *corpus delicti* are false statements adapted to the fraudulent purpose and money parted with upon the faith of such statements. (*Id.*)
30. **CORPUS DELICTI, HOW PROVED—ADMISSIONS OF DEFENDANT INSUFFICIENT.**—The *corpus delicti* must be proved by evidence independent of the extrajudicial confessions or admissions of the defendant. Where there was no substantial evidence of the falsity of the statements alleged to have been made by the defendant aside from the testimony of witnesses as to his admissions, it was the duty of the court to advise the jury to acquit the defendant. (*Id.*)

CRIMINAL LAW (Continued).

31. **DUTY TO "ADVISE" JURY—REQUEST TO "INSTRUCT."**—Where the case is such that under the statute it is the duty of the court to "advise" the jury to acquit for want of evidence of the *corpus delicti*, absolutely required by law to sustain a conviction, the fact that counsel moving orally at the close of the people's case used the word "instruct" instead of "advise" does not justify a denial of the motion, which would sacrifice substantial justice to a mere form. The court under such motion should "advise" an acquittal. (Id.)
32. **CONVICTION FOR MURDER—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION.**—After conviction of a defendant for murder, affidavits upon motion for a new trial for newly discovered evidence, in conflict with that given on the trial, and directed to the impeachment of witnesses who had testified at the trial, were addressed to the sound legal discretion of the trial court; and where it is not clear that such evidence, if received, would or should have changed the result, the discretion of the court in denying the motion will not be disturbed. (*People v. Sing Yow*, 1.)
33. **COUNTER-AFFIDAVITS.**—Upon such motion for new trial it was proper for the court to receive counter-affidavits to enable it properly and intelligently to exercise its discretion in passing upon the motion, and to determine whether a new trial would promote justice or result, with reasonable probability, in a different judgment. (Id.)
34. **CHANGE OF INTERPRETERS—INSUFFICIENT AFFIDAVITS.**—An affidavit by defendant's attorney that the interpreter who officiated at the trial of the defendant was relieved upon the trial of another defendant, but which does not show that the interpreter was not in fact competent, is insufficient. (Id.)
35. **MISCONDUCT OF DISTRICT ATTORNEY.**—It must be a very exceptional case in which a reversal will be ordered by reason of the character of the opening statement of the district attorney; and where such statement was warranted by the evidence, and where there is nothing of such gravity or importance in his cross-examination of the witnesses as to warrant a reversal, and the court carefully instructed the jury to disregard a statement by him in response to the query of the court as to the object of a question asked on cross-examination, there is no misconduct prejudicially affecting defendant's cause. (Id.)
36. **EVIDENCE—DECLARATION OF CONFEDERATE—RES GESTA.**—Where there is evidence that the defendant and five other Chinese, all armed, who co-operated in the killing of the deceased, were standing in front of a house out of which the deceased was to come, evidence is admissible to show, as part of the transaction, a declaration by one of the confederates, then made, that "if Jeong Him [deceased] comes out of the house, we will shoot at him," which was followed by his death from shooting by the confederates when he came out a few moments later. (Id.)

CRIMINAL LAW (Continued).

37. **INSTRUCTIONS—IDENTITY OF DEFENDANT—MODIFICATION OF REQUESTED INSTRUCTION NOT PREJUDICIAL.**—A requested instruction as to the identity of the defendant, from which the court struck out a statement that the jury were not bound to believe that the witnesses were able to identify the defendant with certainty, because they swore positively to his identity, was not modified prejudicially where the jury were instructed that to justify a conviction of the defendant his identity must be proved beyond reasonable doubt, and that if there was a reasonable doubt as to the ability of the witnesses to identify him as the guilty person, they should acquit him. (Id.)
38. **REFUSAL OF REQUESTED INSTRUCTIONS OTHERWISE GIVEN.**—It is not error to refuse requested instructions which are fully and fairly covered by other instructions given by the court. (Id.)
39. **JUDGMENT-ROLL—BILL OF EXCEPTIONS—INSTRUCTIONS—AFFIDAVITS.**—Where the instructions given and refused are certified in the manner required by law they constitute a part of the judgment-roll, and should not be incorporated in the bill of exceptions; but affidavits presented on a motion for a new trial and the minutes of the proceedings had upon such motion should appear only in the bill of exceptions, and the clerk cannot make them a part of the judgment-roll. (Id.)
40. **MURDER IN FIRST DEGREE—ACCIDENTAL KILLING—INSTRUCTION PROPERLY REFUSED.**—Upon a prosecution for murder committed in the perpetration of or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, under section 189 of the Penal Code, the court properly refused an instruction to the jury to the effect that in order to convict of murder in the first degree it must appear beyond all reasonable doubt that the defendant as a fact intended to take the life of the deceased, and that accidental killing, even in an attempt to commit one of the felonies mentioned in that section, is not murder in the first degree. (People v. Milton, 169.)
41. **CONSTRUCTION OF PENAL CODE—MURDER IN FIRST DEGREE.**—Under section 189 of the Penal Code, murder committed by poison, lying in wait, or torture must be willful, deliberate, and premeditated to constitute murder in the first degree; but where the murder is committed in the perpetration of or an attempt to perpetrate arson, rape, robbery, burglary, or mayhem, the killing, whether intentional or unintentional and accidental, constitutes murder in the first degree. (Id.)
42. **MURDER—TRIAL JURY—CHALLENGE TO PANEL—ABSENCE OF RECORD OF SUPERVISORS—EVIDENCE OF SELECTION.**—Upon a trial for murder, the absence of a record of the selection of trial jurors by the board of supervisors under the order of the superior court does not warrant the court in sustaining a challenge to the panel on that ground, where it appears clearly from the uncontradicted

CRIMINAL LAW (Continued).

evidence of members of the board and of the deputy county clerk that the identical list of jurors from which the panel to try the defendant was drawn was in fact selected by the supervisors under the order of the court, and was certified to by the board as so drawn, and was delivered by it into the possession of the county clerk. (*People v. Sowell*, 292.)

43. **MISTAKE IN NUMBER OF JURORS DRAWN—OMISSION OF TWO NUMBERS NOT MATERIAL—CHALLENGE PROPERLY DENIED.**—Where the list of jurors drawn purports to be numbered from one to three hundred, as ordered by the court, but, by inadvertence, and evident mistake, an omission of two numbers appears in the list, such omission does not constitute such a material and substantial departure from the provisions of the law as deprived the defendant of an opportunity to secure a fair and impartial jury; and the denial of a challenge to the panel will not be disturbed for such omission where it appears that a qualified and impartial jury was selected from such panel and tried the cause. (*Id.*)
44. **SELECTIONS FROM SUPERVISOR DISTRICTS—PROPORTION TO POPULATION OF TOWNSHIPS—OMISSION—PRESUMPTION—BURDEN OF PROOF.**—The fact that the jurors drawn were selected from supervisor districts is not material where it appears that they were selected in proportion to the population of townships. The omission to select jurors from a small township will be sustained on the presumption that the supervisors did their duty, and that there were no qualified jurors therein; and it was incumbent upon the defendant to prove that such township contained persons suitable and qualified to have been selected and returned as jurors to sustain a challenge to the panel for omission to select by townships. (*Id.*)
45. **SEPARATION OF LISTS.**—Independent of the question whether the separation of lists required by section 206 of the Code of Civil Procedure does not apply solely to the separation of grand and trial jury lists, and not to township lists, and independent of the question whether the township selections may be tabulated from the trial jury lists, if it appears that the jurors had been selected from townships, the mere fact that they are not so listed in the certification to the county clerk is not of such a substantial merit as to warrant the sustaining of a challenge to the panel on that account. (*Id.*)
46. **CHALLENGES FOR ACTUAL BIAS—QUALIFIED OPINIONS.**—Challenges by the defendant to individual jurors for actual bias were properly denied where their opinions that the defendant had committed a crime in killing the deceased were not unqualified, and were based solely on public rumors and published statements, and were subject to removal by evidence on the trial, and where it appears to the court that the jurors would act impartially and fairly upon the evidence. (*Id.*)

CRIMINAL LAW (Continued).

47. **PREJUDICE AGAINST DEFENSE OF INSANITY—QUALIFICATIONS OF STATEMENT—CHALLENGES PROPERLY DENIED.**—Where questions put to jurors by the defendant tended to bring out an expressed prejudice against the defense of insanity in general, which really related only to the possible interposition of simulated or feigned insanity as a defense, and the jurors upon further examination stated that they had no prejudice against real insanity proved as a defense, and that if such insanity were proven by the defendant, they would recognize and adopt it as a good and perfect defense, and would abide by and follow the instructions of the court as to the law governing the matter of insanity, the court did not err in denying challenges to such jurors. (Id.)
48. **CONTRADICTORY STATEMENTS OF JUROR—CONSTRUCTION—PROVINCE OF TRIAL COURT.**—Where the evidence of a juror upon a challenge for actual bias is contradictory in itself, and subject to more than one construction, and a finding either way would have support in the evidence, the trial court is the final arbiter of the question, and its ruling will not be disturbed upon appeal. (Id.)
49. **EVIDENCE—DYING DECLARATIONS.**—Where the preliminary proof showed that the declarations of the deceased as to the circumstances attending the shooting of him by the defendant were made in expectation of death, and after all hope of recovery was abandoned, his dying declarations were admissible to evidence against the defendant. (Id.)
50. **ORAL DECLARATIONS—THOUGHT OF DECEASED—RULING NOT PREJUDICIAL—THOUGHT OF DEFENDANT.**—Where the dying declarations were oral, and contained the statement "that he thought the defendant thought he was shot through the body," the overruling of a motion to strike out such statement is not prejudicial error, where it appears that the defendant, in giving his version of the shooting after it occurred, stated that when he fired at the deceased he thought he hit him in the side. (Id.)
51. **EXPERT TESTIMONY AS TO INSANITY.**—An expert witness for the people is competent to give his opinion, addressed to the condition of the testimony in the case on the part of the defendant, that it was impossible to have all the symptoms recited in such evidence in the same individual. (Id.)
52. **OPINION AS TO INSANITY—RULING NOT PREJUDICIAL.**—Upon the application of the expert witness to the court as to whether it was necessary to believe all the testimony he heard as an expert, and whether he was compelled to pass his opinion, a ruling of the court that he might pass it upon what he deemed the truthfulness of the testimony is not prejudicial error against the defendant, where the witness, still speaking generally of the testimony for the defendant, answered: "If all these conditions existed in the same individual, I would believe the man was certainly insane." (Id.)

CRIMINAL LAW (Continued).

53. **MURDER — SELF-DEFENSE — ACTING UPON APPEARANCES — INSTRUCTIONS — ERROR — INCORRECT PROVISIO — CIRCUMSPECTION — SUDDEN QUARREL — MANSLAUGHTER.**—Upon a prosecution for murder, where self-defense was relied upon, and the evidence was such that the claim of self-defense arising out of a sudden quarrel rested largely upon the right of the defendant to act upon appearances, he was entitled to clear and unequivocal instructions upon that subject. It was prejudicial error to refuse a requested instruction which, with an immaterial omission, was a correct exposition of the law upon the subject of appearances, and in its place to give practically the same instruction, with the incorrect proviso, that "the killing must have been done with due caution and circumspection, and not in a sudden quarrel or heat of passion," else "the defendant is guilty of manslaughter. (*People v. Thomson*, 717.)
54. **RIGHT OF KILLING IN SELF-DEFENSE.**—If the appearances are such as to justify a killing in self-defense, the defendant is not required to exercise any due care or circumspection in the killing; and the killing in self-defense may be justified, notwithstanding it was done in a sudden quarrel, whether the quarrel may arise out of an assault or consist of a mere altercation of words. (*Id.*)
55. **GENERAL INSTRUCTION AS TO DISTRUST OF "WITNESSES"—DISTRUST OF "DYING DECLARATION"—ERRONEOUS REFUSAL OF SPECIAL REQUEST.**—A general instruction at the request of the prosecution as to the distrust of any "witness" whose testimony has been admitted, if the jury believed him willfully false in one part of his testimony, would not be construed by the jury to include a "dying declaration" of the deceased, who was not a "witness" on the trial. But the jury are entitled to distrust such declaration, on the same principle upon which a witness would be distrusted, and it was error to refuse a special instruction requested by the defendant that if they believed that the deceased was willfully false in one part of his declaration he should be distrusted in other parts, and that under such circumstances they would be entitled to disregard and cast aside the entire declaration. (*Id.*)
56. **INSTRUCTION AS TO DYING DECLARATION—INVASION OF PROVINCE OF JURY.**—An instruction declaring that the dying declaration of the deceased has been received by the court as testimony, and is to be considered by the jury as testimony in the case, invades the province of the jury, who have the right, notwithstanding the preliminary proof, to reject the declaration if they believe it was not made under the sense of impending death. (*Id.*)
57. **INSTRUCTIONS PROPERLY REFUSED.**—Argumentative instructions and instructions fairly covered by the charge of the court and an instruction assuming a controverted fact were properly refused. (*Id.*)
58. **EVIDENCE—ADMISSIONS BY DECEASED PRIOR TO AFFRAY.**—The court did not err in excluding immaterial evidence offered to show admis-

CRIMINAL LAW (Continued).

- sions made by deceased prior to the affray, concerning the terms of an agreement between the deceased and the defendant, about which a dispute arose between them. Such evidence was not admissible to contradict declarations of the deceased which were ruled out. (Id.)
59. **MURDER—PROOF OF CORPUS DELICTI—PURSUIT OF ESCAPED CONVICTS—DEATH FROM BULLET-WOUND—AUTOPSY NOT ESSENTIAL.**—Upon the trial for murder an autopsy is not necessary as proof of the *corpus delicti*; but it is sufficient proof that death ensued from the wound that deceased, while a young man, in good health, engaged as part of a posse in pursuing escaped convicts to rearrest them, received a bullet-wound which passed through his body from the right to the left side, and that immediately on receiving it he dropped, and within a few moments was dead. (People v. Wood, 659.)
60. **EVIDENCE—RECEPTION OF WOUND FROM PURSUED CONVICTS—POSSES—CONFUSION FROM USE OF MAP—PRESUMPTION.**—Notwithstanding uncertainty in the evidence growing out of the use of a map at the trial not fully explained by the words of the witnesses, their motions were part of the evidence before the jury, and where there is nothing in the record indicating that the pursuing posses fired at each other, and the evidence, so far as it can be understood, clearly points to the convicts as the persons who fired the fatal volley, it must be assumed that the jury understood the evidence, and properly concluded that deceased was killed by the fire of the convicts, and not by that of another pursuing party. (Id.)
61. **PRESENCE OF DEFENDANT—ARTICLES LEFT IN CAMP.**—The presence of the defendant with the convicts who fired the fatal volley is shown both by the circumstances of the case and by the finding of articles in a camp which they had hastily broken up after firing the fatal volley, several of which had been previously possessed by defendant. All of the articles so found were admissible as evidence. (Id.)
62. **PROOF OF CONSPIRACY TO ESCAPE—THREATS TO KILL.**—Evidence was admissible to show a conspiracy among the convicts, including the defendant, to escape from prison, and the declarations of the defendant and other conspirators that they would never be taken alive, and that if the militia came after them they would ambush and kill some of them and then escape. (Id.)
63. **SEPARATION INTO PARTIES—COMMON PURPOSE.**—The fact of the separation of the conspirators into several parties does not destroy the effect of the plans and threats of the conspirators as evidence tending to show a guilty intent on the part of the defendant and a common purpose in the accomplishment of which the fatal shot was fired. (Id.)
64. **EVIDENCE OF TRACKS.**—Evidence of tracks leading from the place where the convicts were last seen to the camp from which the fatal

CRIMINAL LAW (Continued).

shots were fired, and of other tracks found the next day leading away from that spot, was competent to show that the convicts had been there. (Id.)

65. **INSTRUCTION AS TO CONSPIRACY—AIDING AND ABETTING COMMON DESIGN—MURDER.**—The court properly instructed the jury that "If several persons confined in the state's prison conspire to escape therefrom, and, if necessary, to kill any person who shall lawfully attempt to arrest or recapture them, and the death of a person so engaged in the attempt to lawfully arrest or recapture them ensue in the prosecution of said common design, it is murder in all who are present aiding and abetting in the common design." Its application is limited to those present aiding and abetting at the time of the attempt to make the recapture and the death of a person engaged in the attempt, and does not make defendant liable to conviction if he was not then present. (Id.)
66. **CONSPIRACY TO ESCAPE A CRIME.**—It was proper to instruct that under section 105 of the Penal Code it is a crime for any person confined in the state's prison for a term less than life to escape therefrom, and that if two or more persons confined in the prison, only one of whom was sentenced to a term less than life, should conspire together and agree to a scheme to escape from the prison, all the persons engaged in the conspiracy are engaged in a conspiracy to commit a crime. (Id.)
67. **REC. OF CONVICTIONS—REQUEST PROPERLY REFUSED.**—Where part of the case of the prosecution consisted in proof that each of the escaped convicts, including defendant, had been convicted and sent to the state's prison, and were at the time of the escape serving their sentences, it was proper for the jury to consider such evidence, and it was proper to refuse a requested instruction that the jury were not to consider any other trials or convictions of the defendant as having any bearing on the case. (Id.)
68. **INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—DIRECT EVIDENCE.**—Where there was direct evidence that the defendant committed the crime charged the court properly refused a requested instruction assuming that the case was one of circumstantial evidence. (*People v. Clark*, 727.)
69. **HYPOTHESIS OF INNOCENCE—REASONABLE DOUBT.**—The jury were properly instructed that in considering the evidence, if they could reasonably account for any fact in the case upon a theory or hypothesis which will admit of defendant's innocence, it was their duty to do so, and if they have a reasonable doubt of his guilt, they should acquit the defendant. The court properly refused an instruction that the jury might reject any theory or supposition on which the evidence might point to defendant's guilt, "even though such theory may be more reasonable and much more probable than the one which admits of his innocence." (Id.)

CRIMINAL LAW (Continued).

70. **GRAND LARCENY—JOINT CHARGE—INSTRUCTION PROPERLY REFUSED.**—Where defendant and another were jointly charged with grand larceny, and the evidence tended to show that the larceny was the result of their joint efforts, it was proper to refuse a requested instruction to the effect that unless the jury were satisfied beyond a reasonable doubt that the defendant, and not some one else, took and carried away the money from the person of the prosecuting witness, as alleged in the information, they could not find the defendant guilty. Such instruction would mislead the jury. (Id.)
71. **INSTRUCTION AS TO ACQUITTAL—PHASE OF EVIDENCE.**—A requested instruction, stating in effect that a verdict of acquittal should be rendered on a certain phase of the evidence, regardless of whatever else might be developed in the case, was properly refused. (Id.)
72. **GRAND LARCENY INCLUDED IN ROBBERY—DISTINCTION—REFUSAL OF REQUEST NOT PREJUDICIAL.**—Robbery includes grand larceny, and, under a charge of grand larceny, the defendant could not be acquitted though the evidence shows robbery; and he could not be prejudiced by the refusal of a requested instruction distinguishing between grand larceny and robbery. (Id.)
73. **PETIT LARCENY—OMISSION OF FORM OF VERDICT.**—The defendant cannot complain of the omission to give the jury a form of verdict permitting them to find him guilty of petit larceny where he did not request an instruction that he might be so convicted, and where it appears that he was guilty of grand larceny from the person if he was guilty of anything. The natural presumption is, that the jury, unless satisfied beyond a reasonable doubt of the offense of grand larceny, would perform their duty and acquit him altogether. (Id.)
74. **FELONY—UNLAWFUL PLACING WIFE IN HOUSE OF PROSTITUTION—INFORMATION—UNCERTAINTY—ABSENCE OF SPECIAL DEMUR-
DER—ARREST OF JUDGMENT.**—Under an information charging that the defendant, at the time and place stated, "did then and there, willfully, unlawfully, and feloniously connive at, consent to, and permit the placing and leaving" of his wife "in a house of prostitution" described, is sufficient to enable a person of common understanding to know that it was intended to place her there for purposes of prostitution, and not in an innocent capacity as cook or seamstress. Any mere uncertainty as to the particular circumstances of the offense was waived by a failure to demur specially, and cannot be made the ground of a motion in arrest of judgment. (People v. Mead, 500.)
75. **NEW TRIAL—DEFECT NOT AFFECTING SUBSTANTIAL RIGHT.**—Where the evidence in the record shows that there was no pretense on the part of the prosecution that the defendant would be guilty if the wife was placed in the house of prostitution for innocent purposes, and the evidence for the prosecution tended to show that she was

CRIMINAL LAW (Continued).

there for the purpose of prostitution, and that defendant had knowledge of the purpose, and actively procured her to be there, the defendant was not prejudiced in any substantial right on the trial by the supposed defect in the information, which might have been seasonably remedied by amendments, if the proper objection had been made by demurrer before the trial, and such defect is not ground for a new trial or for reversal of the judgment. (Id.)

76. EVIDENCE—CROSS-EXAMINATION OF WIFE—OTHER HOUSES OF PROSTITUTION—HOUSE KEPT BY SISTER—FEAR OF HUSBAND.—Where the wife of the defendant, who was a witness for the prosecution, testified on cross-examination by defendant's counsel that she had been an inmate of other houses of prostitution, including one at a particular place, a question asked by defendant's counsel as to whether the house at that place was kept by her sister was properly excluded as immaterial; and where at the time of the ruling there had been no testimony that she entered the house named in the information through fear of her husband, it cannot be said that the court erred in excluding the evidence as tending to show that she would be more likely to enter that house of her own volition, uninfluenced by such fear. (Id.)
77. "HOUSE OF PROSTITUTION"—"CRIBS"—VERDICT NOT AGAINST LAW—INSTRUCTIONS—NEW TRIAL.—Where the evidence shows that the house in question contained twelve rooms, commonly known as "cribs," each of which was occupied by a different woman as a place of prostitution for herself alone, and that the wife of the defendant occupied one of them for that purpose, it shows that defendant's wife was in a "house of prostitution," within the intent and meaning of the statute; and the verdict is not against law merely because the court instructed the jury that the house must be occupied by two or more women. Such instruction would not justify a new trial, the evidence being otherwise sufficient to justify the verdict. (Id.)
78. MISCONDUCT OF DISTRICT ATTORNEY—PROOF OF MARRIAGE—COMMENT UPON EVIDENCE OF DEFENDANT.—Where there had been evidence on the part of the prosecution satisfactorily showing that a legal marriage had been performed, and the defendant had testified equivocally on that subject and denied the marriage, if at all, only by implication, it was not misconduct for the district attorney to comment upon his failure expressly to deny that the woman who was placed in the house of prostitution was his wife. (Id.)
79. APPEAL—INSUFFICIENT ARGUMENT.—A statement of defendant's counsel that the court erred in refusing defendant's proposed instructions, by numbers, with reference merely to the folios of the transcript, is not an argument justifying any consideration of errors supposed to be presented thereby. (Id.)

See Extradition.

DAMAGES. See Assault and Battery, 5; Pleading, 2-4.

DEED.

1. **LIFE ESTATE—INOPERATIVE GRANT OF REMAINDER—REVERSION IN GRANTOR.**—A deed conveying a life estate to the grantee named therein, and after the description declaring that "it is the purpose of the party of the first part by this deed, that after the death of the said party of the second part, the said described lands shall become and be the property of the Roman Catholic Girls' Orphan Asylum of San Francisco, state of California," contains no operative words of grant to such asylum, and conveys to it no present interest in the property. The reversion was left in the grantor, and it required some future conveyance or some testamentary disposition to effectuate its transfer to the orphan asylum. (*McGarrigle v. Roman Catholic Orphan Asylum of San Francisco*, 694.)
2. **PRESENT INTEREST REQUISITE TO A DEED.**—It is fundamental that while possession or enjoyment of an estate may be deferred, a deed, to be operative, must pass a present interest. (*Id.*)
3. **DESCRIPTION—CONSTRUCTION—THIRD PART OF HALF OF RANCHO—QUITCLAIM—EFFECT OF PATENT.**—Where a grantor owned an uncertain third part of an undivided half of a rancho, and on the same day when he deeded an undivided third part of the northern half of the rancho, according to a paper title, brought suit to determine what part of the rancho he in fact owned, and subsequently obtained a patent to the undivided third part of the eastern half of the rancho, and in his deed to the grantee, after a description of the whole rancho by boundaries, added "together with all the estate, right, title, interest, and demand whatsoever which I had or may have, of, in, or to the same, or any part or parcel thereof, to have and to hold the aforesaid premises with all rights, privileges, and appurtenances thereunto belonging," unto the grantee, etc.,—the deed is to be construed most strongly in favor of the grantee, and so as to give effect to all of its operative words, and in view of the parties, the subject-matter at the time of contracting, and the attendant and surrounding circumstances leading to its execution,—and, so construed, *held* that the deed operates as a quitclaim to the whole of the grantor's interest in the rancho, and the effect of the patent was not to create a new title in the patentee, but to confirm in his grantee, through him, the title which had formerly been his. (*Walsh v. Abbott*, 285.)

See *Bona Fide Purchaser*; *Estoppel*, 1; *Fraud*; *Mortgage*, 1, 5, 8; *Reclamation District*.

DENTIST. See *Negligence*, 6-11.

DIVORCE.

1. **NEGLECT TO PROVIDE—FINDINGS NOT SUPPORTED—ABILITY NOT PROVEN—UNCORROBORATED EVIDENCE OF PLAINTIFF.**—A divorce can-

DIVORCE (Continued).

not be granted on the uncorroborated evidence of either of the parties, and where the wife seeks divorce on the ground of the willful neglect of her husband to provide for her the necessities of life, he having the ability to do so, and his ability was shown only by the uncorroborated evidence of the wife, and willful neglect was disproved by the testimony for the husband, the findings in favor of the plaintiff are unsupported. (Berry v. Berry, 784.)

2. **PUBLIC INTEREST.**—The public has an interest in every suit for divorce; and doubts as to the right to a divorce should be resolved against it rather than for it. (Id.)
3. **RESIDENCE OF PLAINTIFF.**—Taking all the circumstances of the case together, the evidence fails to show a clear case of *bona fide* residence on the part of the plaintiff so as to entitle her to bring the action. (Id.)
4. **CONDUCT OF TRIAL BY DEFENDANT IN PERSON—ILLNESS—REFUSAL OF CONTINUANCE—ORDER GRANTING NEW TRIAL—UNAVOIDABLE ACCIDENT.**—In an action for divorce by the husband, where the wife in person conducted the trial, and upon a day to which it was adjourned was too ill to attend, and requested the court by letter to continue the case on that ground, which was refused upon objection of the plaintiff for want of a legal showing, an order granting a new trial upon the sole ground that it was shown by affidavits that illness prevented her attendance, without specifying whether it was granted for abuse of discretion on the part of the court or on the ground of unavoidable accident preventing her attendance at the further hearing of the case upon adjournment, the order will be sustained upon the latter ground. (Smith v. Smith, 615.)
5. **POLICY OF LAW—REASONABLE DILIGENCE OF DEFENDANT.**—In divorce cases the policy of the law is to afford a full hearing on both sides, and to relieve the parties from a situation which prevented it; and the fact that the defendant was not an attorney, and hence unfamiliar with the rules of practice, may be taken into consideration with the other circumstances in the case in determining whether reasonable diligence was employed by her in presenting to the court in the manner she did the fact of her inability to attend the trial on the day to which it was adjourned. The facts disclosed show sufficient diligence, at least in an action of divorce, to obviate objection for want of it. (Id.)
6. **RECEIPT OF MONEY UNDER DECREE OF MAINTENANCE—DEFENDANT NOT ESTOPPED.**—The receipt of money under a decree obtained by the wife in an action for maintenance, which was continued in force by the decree of divorce for the period of six months, cannot estop the defendant from assailing the decree of divorce on motion for new trial. (Id.)
7. **ACTION FOR DIVORCE—TEMPORARY ALIMONY—MERITS OF CASE—GOOD FAITH.**—In an action for a divorce, where the complaint states a

DIVORCE (Continued).

prima facie case, and there is no issue as to the marriage, the merits of the case are not to be considered in the allowance of alimony *pendente lite* further than is necessary to determine whether the wife is acting in good faith, and not for the mere purpose of obtaining money from the husband. (*Kowalsky v. Kowalsky*, 394.)

8. **ALLOWANCE OF COUNSEL FEES—INACCURACY NOT PREJUDICIAL—AUTHORITY OF COUNSEL.**—The direction of the court in the allowance of counsel fees, that they be paid to the plaintiff or her counsel, while inaccurate in expression, is not such an irregularity as to justify an interference therewith upon appeal. Counsel would have the authority to receive the money if the order was silent in reference to the matter. (*Id.*)
9. **PROPRIETY OF ALLOWANCE—COMPARATIVE OWNERSHIP OF PROPERTY—DISCRETION OF COURT.**—Where it was alleged in plaintiff's affidavit, and substantially admitted in defendant's affidavit, that the defendant owned property worth about one hundred thousand dollars, and had an income of about six hundred and fifty dollars per month, and it appeared that the plaintiff owned corporation stocks of the value of about seven hundred dollars, it was within the discretion of the court to make an allowance to plaintiff of alimony *pendente lite* in the sum of one hundred dollars per month, and of counsel fees in the further sum of two hundred and fifty dollars. (*Id.*)
10. **HOME FOR PLAINTIFF—IMMATERIAL FACT—MERITS OF CASE—CRUELTY OF HUSBAND.**—The fact that the defendant had a home in which he was willing that plaintiff should live during the pendency of the action is immaterial where it involved the merits of the case, the plaintiff having alleged that she was driven from the home by the cruelty of the husband. (*Id.*)

See Parent and Child.

EJECTMENT.

1. **AMBIGUITY IN COMPLAINT—"POSSESSION"—SPECIAL DEMURRER.**—Where the complaint in ejectment alleged that at the time of the commencement of the action the plaintiff was the owner of "and in possession" of an entire tract of land therein described, and also alleged that for about one year prior thereto the defendant had been and now is, unlawfully "in the possession," without any right or title, of a described part of the premises, and unlawfully withholds the same from the plaintiff, a special demurrer to the complaint for ambiguity as to the averments of possession should have been sustained. (*Meacham v. Bear Valley Irrigation Co.*, 606.)
2. **TITLE UNDER WILL—VERBAL GIFT FROM TESTATOR—FINDINGS—SUPPORT OF JUDGMENT.**—In an action of ejectment, where the plaintiffs derived title under the will of a deceased testator by

EJECTMENT (Continued).

distribution thereunder, and the defendants by answer and cross-complaint claimed title, possession, and right of possession by verbal gift from the testator, if the findings clearly negative the defendants' claim, and state that plaintiffs are the owners and seised in fee of the land, they are sufficient to support a judgment for the plaintiffs. (*Eva v. Symons*, 202.)

See Mortgage, 1.

ELECTIONS.

1. **CONTEST—CUSTODY OF BALLOTS—SUFFICIENCY OF EVIDENCE—BURDEN OF PROOF UPON CONTESTEE.**—Where it appears from the evidence that the envelopes containing the ballots were in the same condition as received by the clerk,—intact and unopened,—in the absence of evidence on the part of the contestee, who has the burden of proof to show that they were tampered with, or exposed under such circumstances that they may have been tampered with, or any evidence even raising a suspicion that they were disturbed and tampered with, the ballots were properly admitted in evidence. The burden of proof is not sustained by a naked showing that the ballots might have been more securely kept, and that it was possible for one to have molested them. (*Huston v. Anderson*, 320.)
2. **LEGALITY OF VOTES—REGISTRATION—IRREGULAR AFFIDAVITS.**—Voters who were in fact enrolled upon the great register, and whose purported affidavits, apparently proper in form, were contained in the book of affidavits delivered by the county clerk to the board of election of the proper precinct, and who were allowed to vote at the election, cannot be held, after the election, to be illegal voters simply because their affidavits had not been in fact sworn to before the county clerk or any of his deputies. (*Id.*)
3. **USE OF AFFIDAVITS IN PRECINCTS—OBJECT OF LAW—LIST OF REGISTERED VOTERS OF PRECINCT.**—The object of the law as to the use of the affidavits of the registered voters at the precincts was simply to dispense with the printed copies of the great register, and to afford an authenticated list of qualified voters for the precinct who have in fact been enrolled by the registration officer upon the great register. (*Id.*)
4. **QUALIFICATION OF ELECTORS—EFFECT OF AMENDMENT OF CODE.**—The fact that section 1083 of the Political Code prior to the amendment of 1899 provided that persons who were otherwise qualified, and whose names were enrolled upon the great register, were declared to be qualified electors, and that under that section as amended in 1899 qualified electors are only those "who have conformed to the law governing the registration of voters," does not show any material change in the law affecting the question of the qualification of electors, or affecting the rule that a mere irregularity in the method by which registration was secured does not render illegal the votes of registered voters. (*Id.*)

ELECTIONS (Continued).

5. **ILLEGAL VOTES—IMPROPER ASSISTANCE OF VOTERS—SHOWING REQUIRED.**—Votes cast by persons assisted to vote by the election officers are illegal under section 1208 of the Political Code, as amended in 1899, unless it appears from the register that each of them "has declared under oath, when he registered, that he cannot read, or that by reason of physical disability he is unable to mark his ballot." (Id.)
6. **INQUIRY AS TO PERSONS VOTED FOR—ERROR NOT GROUND FOR REVERSAL.**—Where it appears that persons who were in fact under disability when registered, but who did not then declare on oath their disability, or who declared the contrary, were illegally assisted by members of the board, the court erred in refusing to allow the appellant to inquire how the parties depositing such votes voted as to the office in question; but such error is not ground for reversal where, conceding that they all voted for respondent, he would still have a majority of the votes legally cast. (Id.)
7. **VOTER UNABLE TO READ ENGLISH LANGUAGE—RIGHT TO ASSISTANCE—TIME OF OATH OF OFFICERS.**—Where an affidavit for registration showed the inability of the registered voter to read the constitution in the English language, such voter had the right, on demand, to assistance, regardless of whether or not he had also stated that he could mark his ballot; and the mere fact that the proper oath of the election officers who assisted him was not taken until immediately after they had assisted him does not invalidate his vote. (Id.)
8. **LEGAL RESIDENCE OF VOTER.**—Where residence is spoken of in connection with the right of a person to vote, "legal residence" is meant. Every person has in law a residence, which cannot be lost until another is gained. A voter who temporarily removed from the precinct where he was registered, without the intention of making the place to which he removed his home, did not lose his legal residence in the precinct where he was registered, notwithstanding he may not have had any certain house, room, or place therein that he called his home. The question of legal residence in one of fact upon which the finding of the court will not be disturbed. (Id.)
9. **DISTINGUISHING MARKS UPON BALLOTS—CROSS IN BLANK SPACE—DOUBLE CROSS.**—A cross in a blank space and a double cross after a name are each distinguishing marks which vitiate ballots containing them. (Id.)
10. **MARKS NOT DISTINGUISHING.**—Under the law as it stood at the general election in 1902, a cross on the parallelogram containing the candidate's name and a cross on the words "Yes" or "No" in voting for a constitutional amendment, instead of in the blank space after the same, are not distinguishing marks. (Id.)
11. **INCORRECT DESIGNATION OF VOTING PRECINCTS IN AFFIDAVITS—CORRECTIONS BY CLERK—LEGALITY OF VOTES NOT AFFECTED.**—An incorrect designation of voting precincts in affidavits for registration,

ELECTIONS (Continued).

- which were corrected by the clerk before the time for registration expired, does not render the registration illegal, where the voters registered actually resided in the precincts as corrected by the clerk at the time of their registration, and the correction was made simply to conform to the facts. (Id.)
12. **ABSENCE OF CERTIFICATE TO OATH—PRESUMPTION—VOTER NOT PREJUDICED.**—Where the registration of a voter was made by a deputy clerk, who failed to certify the registration affidavit, it is to be presumed that the deputy discharged his duty, so far as to administering the necessary oath; and the voter cannot be deprived of his vote by the mere neglect of the deputy to perform his duty by certifying the fact of the oath. (Id.)
13. **INITIALS OF ELECTION OFFICERS UPON BALLOT.**—Initials upon a ballot which were presumably the initials of election officers, placed thereon during the canvass of the votes, are not a distinguishing mark which vitiates the ballot. (Id.)
14. **OFFICIAL BALLOT—CONGRESSIONAL DISTRICT—PERCENTAGE OF VOTE OF STATE.**—In a congressional district where the provisions of the Primary Election Law are not mandatory, a political party which has cast three per cent of the entire vote of the state at the last election is entitled to nominate a member of the house of representatives in Congress for such district, and to have such nomination placed upon the official ballot by the secretary of state, notwithstanding three per cent of the vote of such party was not cast within such district. (Gaylord v. Curry, 154.)
15. **ELECTION CONTEST—VERIFICATION OF STATEMENT—CASE AFFIRMED.**—The verification of the statement of an election contest may be in the ordinary form of the verification of a pleading. (Kirk v. Rhoads, 46 Cal. 403, affirmed.) (McCardle v. Barstow, 135.)
16. **EVIDENCE—PRESERVATION OF BALLOTS—DISCRETION—REVIEW UPON APPEAL.**—Upon the contest of an election the question whether the ballots were safely preserved in their original condition is largely within the judgment and discretion of the trial court; and if the evidence fairly warrants its conclusion, its determination of that question will not be disturbed upon appeal. (Id.)
17. **OBJECTION TO UNCOUNTED PRECINCTS—WAIVER BY CONTESTANT—PROOF BY CONTESTEE—ADMISSIBILITY—ESTOPPEL.**—The contestant, after establishing a majority in counted precincts, had the right to waive his objection to misfeasance and malconduct alleged by him in other uncounted precincts; and where the contestee offered the ballots in the remaining precincts, he cannot be heard to say that the ballots offered by him were not admissible, or were not safely preserved. (Id.)
18. **DISTINGUISHING MARKS.**—Ballots stamped with a cross after the words "No nomination" have a distinguishing mark, and were properly rejected. (Id.)

ELECTIONS (Continued).

19. **CONTEST—INSUFFICIENT DEPOSIT OF BALLOTS—ERROR NOT SHOWN.**—Where it was stipulated that all of the ballots objected to by either party should be withdrawn from the clerk's office by the party appealing, and be deposited with the clerk of this court, and the contestee appellant only deposited twenty-eight out of two hundred and fifty-one ballots rejected for the contestant, and no other ballots were deposited, no error is shown in counting or rejecting any of them. (*Treanor v. Williams*, 315.)
20. **STATEMENT OF CONTEST—RESULT OF CANVASS—NUMBER OF LEGAL VOTES CAST—ISSUES—FINDING—VARIANCE—SUPPORT OF JUDGMENT.**—Where the statement of contest showed the result of the canvass by the election board in counting 4,862 votes alleged to have been cast for the contestee, without alleging that they were legally cast, and also alleged misconduct of election boards in counting for the contestee ballots which were actually cast for the contestant, and further alleged that the contestant received 5,083 legal votes, and that the contestee received a less number of legal votes than the contestant at said election, and the case was tried without objection, upon the theory that the court was called upon to decide which of the parties actually received the greatest number of legal votes, a finding that the contestant received 4,004 legal votes and that the contestee received 4,001 legal votes does not show a material or prejudicial variance from the statement as to the 4,862 votes, and is sufficient upon appeal to support a judgment for the contestant. [*Beatty, C. J., dissenting.*] (*Id.*)
21. **ILLEGAL BALLOTS—DISTINGUISHING MARKS.**—The court did not err in rejecting all ballots as illegal which had crosses after the words "No nomination," as containing a distinguishing mark. The fact that there were a large number of such ballots does not affect the rule; and the intent of the voter cannot be shown other than by what appears upon the face of the ballot. (*Id.*)
22. **INTEGRITY OF BALLOTS.**—Where the pouches containing the ballots were shown to have come from the clerk's office in the same condition as when they were received there, and there was no circumstance to raise a suspicion as to their integrity, an objection to the opening of the pouches by the court is without merit. (*Id.*)
23. **PURITY OF ELECTION LAW—IRRELEVANT QUESTION.**—The question whether contestant had complied with the Purity of Election Law, and as to the failure of the court to find thereupon, need not be considered. The matter is irrelevant to an election contest. (*Id.*)
- See *Municipal Corporations*, 10-12; *Office and Officers*, 6-10, 11-14.

EMINENT DOMAIN.

- CONDEMNATION OF ROAD OVER LANDS OWNED BY WATER COMPANY—MORE NECESSARY PUBLIC USE.**—A water company engaged in the public use of supplying pure and fresh water to the inhabitants of a county, and which has the title to lands subject to the case

EMINENT DOMAIN (Continued).

ment of a public road thereon, may, under subdivision 3 of section 1240 of the Code of Civil Procedure, maintain a proceeding in eminent domain against the county to condemn part of such road for the construction and maintenance of a dam and reservoir thereon where it appears that such use thereof is a more necessary public use than that of the road to which it had been already appropriated. (*Marin County Water Company v. County of Marin*, 586.)

ESTATES OF DECEASED PERSONS.

1. **ACCOUNT OF SPECIAL ADMINISTRATRIX—COMMISSIONS PAID REAL-ESTATE AGENT—UNAUTHORIZED EXPENDITURES—BENEFIT OF ESTATE.**—The court in settling the account of a special administratrix properly disallowed expenses incurred in employing real-estate agents to sell the property of another estate, from the sale of which the estate was benefited by the payment in full of a claim in favor of the deceased against such other estate. The fact that the expenditure was made in good faith, and for the benefit and preservation of the estate, cannot justify an expenditure not authorized by law. (*Estate of Bell*, 646.)
2. **CONSTRUCTION OF CODE—EXPENSES INCURRED IN PERFORMANCE OF TRUST FOR BENEFIT OF ESTATE.**—The repayment out of trust property for expenses incurred in the performance of the trust for the actual benefit of the estate, provided for in section 2273 of the Civil Code, has no application to executors, administrator, or guardians, who are excluded from the provisions of the chapter concerning express trusts by the terms of section 2250 of that code. (*Id.*)
3. **SALE OF MINING STOCK—EXPENSES FOR EXAMINATION AND REPORT UPON MINE.**—A special administratrix has no power as such to sell mining stock, and expenses incurred by her in the employment of an expert to examine and report upon the condition of the mine were properly rejected, and cannot be justified as an effort to determine the value of stock held by another estate against which a claim was held by the estate of which she was special administratrix. (*Id.*)
4. **EXPENSES PAID DETECTIVE AGENCY—WATCHING OFFICE OF REMOVED EXECUTORS.**—An item in the account for expenses paid to a detective agency for watching the office of former executors, who had been removed, on the ground that the special administratrix believed them to be criminals, cannot be said to have been improperly rejected where it is not shown that either of them ever endeavored to conceal or make away with any of the papers belonging to the estate, but it appeared that they had given up all of the papers called for. (*Id.*)
5. **EXPENSES OF REMOVING EXECUTOR.**—Items in the account of the special administratrix for costs and expenses incurred in the removal of an executor, prosecuted by her as widow and heir of

ESTATES OF DECEASED PERSONS (Continued).

the deceased, and as a creditor of his estate, were properly rejected. It matters not that the proceeding was beneficial to the estate. The attorney's fees, costs, and expenses are chargeable, not to the estate, but solely to the heir or creditor who prosecutes the proceeding. (Id.)

6. **EXPENSES FOR ENGROSSING BILL OF EXCEPTIONS—DUTY OF ATTORNEY.**—It is the legal duty of the attorney employed by the special administratrix to defend a litigation to engross a bill of exceptions in the case, and an item for expense paid to a clerk in his office for engrossing the bill cannot be allowed in the account of the special administratrix. (Id.)
7. **ITEMS OF CREDIT GROWING OUT OF DISALLOWANCE—MODIFICATION OF SETTLED ACCOUNT—COSTS.**—Items of credit to which the special administratrix was entitled in connection with the disallowance of moneys paid to real-estate agents and to a mining expert, and which the court below would have corrected upon proper application, will be allowed as a modification of the settled account, without costs. (Id.)
8. **FAMILY ALLOWANCE—FINAL ORDER—DECREE OF PARTIAL DISTRIBUTION—STATUS OF WIDOW—FINAL ACCOUNTS OF ADMINISTRATRIX.**—Where a family allowance was made to one claiming to be the widow of the deceased, who was appointed administratrix of the estate, and the order became final by failure to appeal therefrom or to move to set it aside, it becomes conclusive as to her status as widow for all purposes connected with the order and payment of the money thereunder, and it cannot be collaterally attacked upon the settlement of the accounts of the administratrix, notwithstanding it was determined upon a decree of partial distribution that she was not, and never had been, the widow of the deceased. In all collateral proceedings the order or decree must each stand upon its own record. (Estate of Nolan, 559.)
9. **POWER OF COURT TO SUSPEND ORDER.**—The probate court had no power, without notice or showing upon notice, to suspend the order for the family allowance after it had become final by the lapse of the time to appeal therefrom. (Id.)
10. **ALLOWANCE BY ADMINISTRATOR—PART OF CLAIM—REJECTION OF RESIDUE—PRESENTATION TO JUDGE—STATUTE OF LIMITATIONS.**—The allowance of a claim only in part by the administrator is a rejection of the residue; and if an action is not begun within three months thereafter, it is barred by section 1498 of the Code of Civil Procedure, notwithstanding it is begun within three months from the approval of the judge of the part allowance made by the administrator. Such claim need not have been presented to the judge, whose action was not necessary to the completion of the rejection by the administrator, and could not affect such rejection. (Jones v. Walden, 527.)

ESTATES OF DECEASED PERSONS (Continued).

11. **PRESENTATION OF CLAIM—REJECTION BY JUDGE OR ADMINISTRATOR—RUNNING OF STATUTE.**—It is only where a claim has been allowed by an administrator that it must be presented to the judge, who may reject it notwithstanding such allowance. A claim may be conclusively rejected by either the administrator or the judge; and where there is rejection by either the statute begins to run from the date of such rejection. (Id.)
12. **WILL—UNDEVISED REAL ESTATE—EXPENSES OF ADMINISTRATION.**—Where a testator, whose whole estate consisted of realty, devised only one half thereof, without making any provision in the will for payment of the debts and expenses of administration, or appropriating any part of his estate therefor, the burden of such debts and expenses must be borne wholly by the undevised portion of his real estate as to which he died intestate. (Estate of Traver, 508.)
13. **CONSTRUCTION OF CODE—INSUFFICIENCY OF APPROPRIATION IN WILL.**—Section 1560 of the Code of Civil Procedure is intended to apply where there is ample and sufficient appropriation in the will for debts and expenses; and section 1562 of the same code is intended to apply to all cases of insufficient appropriation in the will, no matter from what the insufficiency may spring, whether because the appropriation was too small, or because no appropriation was made. (Id.)
14. **PARTIAL DISTRIBUTION—APPEAL BY EXECUTRIX—ISSUE OF LAW—SUFFICIENCY OF PETITION.**—An executrix may appeal from an order for partial distribution to legatees under the will, where she presents for review an issue of law as to the sufficiency of the petition to show that there were sufficient assets to pay the legacies without loss to the creditors. In such case both the power or the executrix to comply with the order and the right to an immediate distribution are involved, and upon these questions the executrix is interested, both personally and on behalf of the creditors, and has a clear right of appeal. (Estate of Murphy, 464.)
15. **SUFFICIENCY OF PETITION AS TO EXECUTRIX—DEMURRER PROPERLY OVERRULED.**—Where the petition for partial distribution alleged, in the exact language of the statute, "that said estate is but little indebted, and that the shares and legacies of your petitioners may now be allowed to them without loss to the creditors of the estate of said deceased," it is sufficient as against the executrix; and her demurrer thereto, on the ground that the facts stated do not entitle the petitioner to relief, and that the petition was uncertain as to the value or nature of the estate, was properly overruled. (Id.)
16. **KNOWLEDGE OF EXECUTRIX.**—The executrix, generally, must have greater knowledge of the value and character of the property, the amount of money on hand, and the amount of the indebtedness than any other person. (Id.)

ESTATES OF DECEASED PERSONS (Continued).

17. **STATEMENT OF ULTIMATE FACTS SUFFICIENT.**—A statement of the ultimate facts concerning the nature of the estate and the amount of the debts, which, according to the code, the court must find to exist before making the order for partial distribution, affords sufficient information of the grounds on which the application will be made to enable the executrix at least to make any proper opposition or defense. If it accomplishes this, it serves the purpose for which pleadings are required in such case. (Id.)
18. **CONTROVERSIES AS TO LEGACIES—EXECUTRIX NOT INTERESTED.**—The executrix, as such, has no interest in any controversy which concerns only the rights of legatees as between themselves; and she cannot urge that the petitioning legatees had forfeited their rights to their legacies because of an alleged violation of the will, that if any one named therein should contest the same he or she should take nothing under it, where that question affects only the rights of residuary devisees, and does not affect the executrix in her representative capacity. (Id.)
19. **CONCLUSIVENESS OF ORDER AS TO DEFAULTING LEGATEES AND DEVISEES.**—Where none of the other legatees or devisees appeared as such at the hearing, and in no manner objected to the order for partial distribution to the petitioning legatees, and the order has become final and conclusive as to them, it is equally conclusive upon the executrix in her capacity as residuary devisee, so far as the rights of the petitioning legatees are concerned, where she only appeared and objected to their petition in her representative capacity as executrix. As devisee, she must be considered as one who has suffered default. (Id.)
20. **FINAL ACCOUNTS OF ADMINISTRATORS—PAYMENTS UPON AUTHORIZED MORTGAGE—PROBATE HOMESTEAD.**—Where the court had authorized a mortgage upon the real estate of a decedent the proceeds of which were used in paying debts and expenses of administration, and, subsequent to the mortgage, had set apart a probate homestead out of a portion of the mortgaged premises, the administrators had the right to apply the whole of the proceeds of the sale of the residue of the mortgaged premises toward the payment of the mortgage on the probate homestead; and it was error for the court to refuse to allow credit therefor in the final account of the administrators. (Estate of Shively, 400.)
21. **DUTY OF COURT AS TO PROBATE HOMESTEAD—UNENCUMBERED REAL ESTATE.**—It was the duty of the court, before the property was mortgaged, to set apart a probate homestead from the unencumbered real estate, regardless of the creditors of the estate, which could not afterward be mortgaged. A mortgage mistakenly authorized thereon should be paid out of moneys realized from the sale of other property belonging to the solvent estate. (Id.)
22. **CHARGE UNSUSTAINED BY EVIDENCE—OPINION OF JUDGE.**—Where a charge against the administrators for rent received was unsustained

ESTATES OF DECEASED PERSONS (Continued).

by evidence appearing in the record, it must be deemed erroneous. The opinion of the judge giving his reasons for the charge, tending to justify it, is not evidence, and is no part of the record. (Id.)

23. **ACCOUNT NOT EVIDENCE—NEGLECT OF APPELLANT—PRESUMPTION.**—The account of the administrator is not evidence as to contested items; and where the appellant has not pointed out the evidence as to items charged or items disallowed as credits, it must be presumed that the evidence sustains the items charged, and does not sustain the items disallowed. (Id.)
24. **COLLATERAL INHERITANCE TAX LAW—COMMISSIONS OF TREASURER—MODIFICATION OF STATUTE—COUNTY GOVERNMENT ACTS.**—Section 20 of the Collateral Inheritance Tax Law, giving to the treasurer of each county a commission on all sums collected thereunder in addition to his salary, though not wholly repealed, has been so far modified by the County Government Acts of 1893 and of 1897 that the commissions cannot be received by the county treasurer individually to his own use, but must be paid into the treasury of the county. (County of San Diego v. Schwartz, 49.)
25. **PROBATE OF HOLOGRAPHIC WILL—MISTAKE IN YEAR OF DATE.**—A holographic will which is wholly in the handwriting of the deceased testator, and dated and signed by him, should be admitted to probate notwithstanding an evident mistake or error in the year of the date. If it becomes necessary, the true time at which such will was made may be inquired into; but a simple showing that the holographic will was made at a time different from that written therein will not invalidate it. (Estate of Fay, 82.)
26. **TIME FOR APPEAL FROM ORDER REFUSING PROBATE.**—An appeal from an order refusing probate of the holographic will is properly taken within sixty days from the entry of the order. The section of the code in regard to the rendition of judgments does not apply. (Id.)
27. **AGGRIEVED PARTIES—BENEFICIARIES UNDER TRUST—VALIDITY—REVIEW UPON APPEAL.**—The beneficiaries under a trust created by the holographic will are aggrieved parties, entitled to appeal from the order refusing probate thereof; and the validity of the trust clause as to the appellants will not be determined upon such appeal. (Id.)
28. **PROBATE HOMESTEAD—MOTION TO MODIFY AND VACATE ORDER—JURISDICTION.**—The superior court has jurisdiction to hear and determine upon its merits a motion made within six months after an order setting apart a homestead out of the estate of a deceased person to modify and in part to vacate the order; and an objection that the facts stated as grounds of the motion did not justify a modification or vacation of the order furnishes no reason for refusing to hear and consider the motion. (Cahill v. The Superior Court of the City and County of San Francisco, 42.)
29. **EFFECT OF ORDER DENYING MOTION FOR WANT OF POWER—DISMISSAL—REFUSAL TO ACT.**—An order denying the motion solely on the

ESTATES OF DECEASED PERSONS (Continued).

ground stated, that the original order setting apart the homestead had become final, and that the court was without power to modify or vacate the former order, or to entertain a motion to that effect, is in substance no more than a dismissal of the motion for lack of jurisdiction and a refusal to act upon the motion. (Id.)

30. **DETERMINATION NOT CONCLUSIVE—DUTY OF COURT—MANDAMUS.**—The determination by the court that it did not have jurisdiction to modify or vacate the order setting apart the homestead is not conclusive where there is no question of fact or of the sufficiency of facts involved in its ruling. The law especially enjoins upon the superior court the duty of hearing and determining all matters which are within the jurisdiction and which come properly before it; and the writ of mandate may issue to compel the court to hear and determine the motion upon its merits. (Id.)
31. **LACK OF REMEDY BY APPEAL.**—An appeal from the original order setting apart the homestead would have been useless, as it was made without notice or contest, and there could be no bill of exceptions showing the facts upon which it was based; and the order refusing to vacate or modify the order setting apart the homestead is not appealable. (Id.)
32. **REMEDY BY MANDAMUS—LACHES—EXCUSE FOR DELAY—DISCRETION OF COURT.**—The defense of laches to the remedy by *mandamus* differs from that of the statute of limitations, which bars the remedy from mere lapse of time; and where the defense of laches merely is relied upon the petitioner for the writ may present circumstances excusing or justifying the delay, and showing the absence of prejudice therefrom; and if the court in its sound discretion deems the showing sufficient, the remedy will not be barred by laches. (Id.)

See Evidence; Execution, 1-3; Homestead; Negotiable Instruments, 5-9; Quieting Title, 2, 3; Wills.

ESTOPPEL.

1. **ACTION TO QUIET TITLE—UNDELIVERED DEED—WRONGFUL POSSESSION—BONA FIDE PURCHASER—IMPROVEMENTS—EQUITABLE ESTOPPEL.**—A wife who executed and acknowledged a deed of her separate property to her husband, and retained the same without delivery, is equitably estopped to deny the delivery and to claim the premises in an action to quiet title against a *bona fide* purchaser deriving title through her husband, who wrongfully obtained possession of the deed and sold the property, where it appears that, instead of promptly repudiating the act of the husband, she, with full knowledge of the facts, allowed such purchaser to make permanent improvements upon the property, without notice to her claim thereto prior to the commencement of the action, which was brought nearly three years after acquiring such knowledge. (Baillarge v. Clark, 589.)

ESTOPPEL (Continued).

2. **PRINCIPLES OF EQUITABLE ESTOPPEL.**—Although the title was not operative in the husband for want of delivery of the deed to him by the wife, the equitable estoppel of the wife to deny the delivery as against the *bona fide* grantee of the husband rests upon the maxims that "He who can and does not forbid that which is done in his behalf is deemed to have bidden it," and that "Where one of two innocent persons must suffer, he through whose agency the loss occurred must sustain it," and upon the rule that "It is unconscionable for a party to permit another to improve the property obtained in such a bargain and then claim the property and improvements, even were he to pay the costs of the improvements." (Id.)

EVIDENCE.

QUALIFICATION OF WITNESS—ACTION BY LESSEE UPON CONTRACT OF DECEASED LESSOR—ASSIGNMENT BEFORE CONTRACT.—A witness who had assigned all his interest in a lease and in business upon the leased premises before a fire injuring the leased property and destroying a kiln thereupon is not the assignor of a cause of action for breach of a contract of the lessor, made after the fire, to repair the leased premises and rebuild the kiln, and is not disqualified to testify to events occurring before the death of the lessor, under section 1880 of the Code of Civil Procedure. (*Frey v. Vignier*, 251.)

See Assault and Battery, 2, 3; Bona Fide Purchaser, 1, 2, 6; Boundary, 1-7; Contract, 4, 6-8, 12; Corporations, 8-10; Criminal Law, 9-13, 17, 19-23, 25, 28-30, 32, 36, 49-52, 56, 58-64, 68, 71, 76; Election, 1, 16; Husband and Wife, 7-13; Landlord and Tenant, 5; Mortgage, 1, 2, 6, 9, 16; New Trial, 2, 3.

EXECUTION.

1. **EXEMPTION OF LIFE-INSURANCE MONEY DUE BENEFICIARY.**—The exemption from execution under subdivision 18 of section 690 of the Code of Civil Procedure, of "all moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance, if the annual premiums paid do not exceed five hundred dollars," extends not only against the debts of the person whose life was insured, and who paid the premiums, but also to the debts of the beneficiary to whom it is payable after the death of the insured. (*Holmes v. Marshall*, 777.)
2. **ESTATE OF DECEASED PERSON—SETTING APART POLICY TO WIDOW AS EXEMPT.**—The proceeds of a policy payable to the administrators of a deceased husband may be set apart to the widow as being property exempt from execution, and such proceeds, when so set apart, are exempt from her debts. (Id.)
3. **ATTACHMENT OF EXEMPT POLICIES—DEPOSIT IN BANK—POWER OF COURT TO DISSOLVE ATTACHMENT.**—The deposit in bank of the proceeds of life-insurance policies payable to the widow as beneficiary, and of the policy set apart to her as exempt from execution, does

EXECUTION (Continued).

not remove the exemption; and the court has the power to dissolve the levy of a writ of attachment upon such deposits, as being exempt from execution, in an attachment suit upon a note signed jointly by the husband and wife. (Id.)

4. **ISSUANCE UPON JUDGMENT AFTER FIVE YEARS—EX PARTE MOTION.**—Under section 685 of the Code of Civil Procedure, as amended in 1895, the court may, upon *ex parte* motion of the judgment creditor, authorize the issuance of execution upon a judgment rendered since the passage of the amendment, notwithstanding the lapse of five years from the date of the judgment. (Harrier v. Bassford, 529.)
5. **RUNNING OF STATUTE UPON JUDGMENT.**—A judgment, as a cause of action, does not become final until the lapse of six months from the date of its entry, and it cannot be barred by limitation until the period of five years and six months after its entry. (Id.)
6. **CONSTITUTIONAL LAW—POWER OF LEGISLATURE—ABSENCE OF NOTICE—DUE PROCESS OF LAW.**—The legislature has power under the constitution to permit the issuance of an execution upon motion of the judgment creditor without notice to the defendant. Such notice is not necessary to constitute due process of law, which is sufficiently obtained by service of the summons in the original action. (Id.)
7. **JUDGMENT UPON JOINT NOTE—SURETYSHIP—RELEASE OF PRINCIPAL DEBTOR—KNOWLEDGE OF OBLIGEE.**—Where, so far as appears as to the obligee, a note is a joint obligation, the judgment rendered thereon must bear the same character, and a release of one of them does not operate to extinguish the liability of the other. But conceding, without deciding, that after judgment upon such a note it may be shown that one of the joint makers was in fact surety for another, such showing cannot avail where it is not shown that the obligee was aware of the relations between the debtors. (Id.)
8. **APPRAISEMENT OF HOMESTEAD—FILING VACANCY IN BOARD OF APPRAISERS—NOTICE.**—Where the appraisers appointed to appraise the homestead, a portion of which was subject to execution, were properly appointed upon due service of notice, and the absence of one of the qualified appraisers from the county created a vacancy, the court had authority to fill the vacancy with a qualified appointee without further notice. (Id.)
9. **BEACH AND WATER-LOTS OF SAN FRANCISCO—SALE UNDER EXECUTION—POWER OF LEGISLATURE—SUBSEQUENT SALE BY COMMISSIONERS OF FUNDED DEBT.**—The city of San Francisco held its beach and water-lot property as a private proprietor, and such property was subject to execution for the city's debt, and remained subject to execution therefor until the debt was paid, which right the legislature could not impair. An action for a prior debt of the city, begun before the passage of the act of May 1, 1861, which

EXECUTION (Continued).

provided for a conveyance of such property to the commissioners of the funded debt, and a sale of water-lots under execution upon the judgment in such action, made after the passage of that act, will prevail over a subsequent deed of the same property by the commissioners of the funded debt, executed under the authority given by that act. (*Dunham v. Angus*, 165.)

10. **CASE APPLIED AND AFFIRMED.**—The case of *Smith v. Morse*, 2 Cal. 524, applied and affirmed, as controlling authority. (*Id.*)

See Fraud, 1, 2; Mortgage, 4.

EXECUTORS AND ADMINISTRATORS. See Estates of Deceased Persons.

EXTRADITION.

1. **REGULARITY OF PROCEEDINGS—REVIEW UPON HABEAS CORPUS.**—In extradition proceedings, where the indictment in the state to which the extradition is sought charges a public offense within its statute, the regularity of the proceedings had before the extradition is not reviewable upon *habeas corpus*. (*In re Letcher*, 563.)
2. **FUGITIVE FROM JUSTICE—CONSTRUCTION OF FEDERAL CONSTITUTION—DECISION OF UNITED STATES SUPREME COURT.**—The question as to whether or not the petitioner is a fugitive from justice within the meaning of the federal constitution having been settled by the decision of the supreme court of the United States, its decision on that question is absolutely binding upon this court. (*Id.*)

FINDINGS.

1. **CONSTRUCTION OF FINDINGS.**—The court should not strain the language of a finding to make out a case of conflict; but it should be reconciled if it can be reasonably done. No such error or defect is here shown, in the answer and findings, as to justify a reversal. (*Heaton-Hobson Associated Law Offices v. Arper*, 282.)
2. **OMISSION IN FINDINGS—APPEAL FROM JUDGMENT—ABSENCE OF EVIDENCE—PRESUMPTION.**—Upon appeal from the judgment, without any bill of exceptions showing what evidence was given, the presumption is in favor of the correctness of the judgment, and it will not be presumed against such correctness that any evidence was given upon an issue as to which there was no finding, and the judgment will not be reversed for failure to find specifically upon issues as to the right of possession and damages. (*Eva v. Symons*, 202.)
3. **CONSTRUCTION OF FINDINGS—RECOVERY OF REAL PROPERTY IN SAN FRANCISCO—DEFENSE OF STATUTE OF LIMITATIONS—ACT OF 1864.**—In an action to recover real property in San Francisco, where the answer pleaded that the action was barred by the provisions of section 318 of the Code of Civil Procedure, and also pleaded the act of March 5, 1864, a finding that the action is not barred by

FINDINGS (Continued).

the provisions of section 318 is equivalent to a finding against the truth of the allegation in the answer under the act of March 5, 1864, that neither plaintiff nor his privies in estate have been in possession of the property within five years next before the beginning of the action, and the omission specifically to find on such allegation is not material. (*Baum v. Roper*, 116.)

4. **OMISSION IN FINDINGS—DECISION NOT AGAINST LAW.**—An omission in findings upon an issue upon which the defendant had the burden of proof, and upon which no evidence was introduced, does not render the decision for the plaintiff against law. (*Holmes v. Warren*, 457.)
5. **SUFFICIENCY OF FINDINGS—PROBATIVE AND ULTIMATE FACTS—CONCLUSIONS OF LAW.**—Where the findings are in part of probative facts and in part of ultimate facts, and findings of ultimate facts appear in the conclusions of law, they may all be considered in determining whether they are supported by sufficient evidence, and are sufficiently responsive to the issue made by the pleadings, and support the judgment. (*Mason v. Lievre*, 517.)
6. **ACTION OF QUIA TIMET—ORDERS REPUDIATED AS FORGERIES—FINDING AS TO GENUINENESS—REVIEW UPON APPEAL.**—In an action of *quia timet* to determine the liability of the defendants upon orders drawn upon the plaintiff corporation and paid by it, which purported to be signed by the superintendent of the defendants, and which the defendants repudiated as forgeries, where the court found that the checks were genuine, and were authorized by the defendants, such finding is conclusive where no motion for a new trial was made and the appeal was taken more than sixty days after the entry of the judgment. (*German Savings and Loan Society v. Collins*, 192.)
7. **UNFAIRNESS IN TAKING DEPOSITION—ERROR WITHOUT INJURY.**—Alleged unfairness to appellants in the taking of the deposition of their defaulting bookkeeper, who obtained the money upon the order in question, consisting of his refusal, upon the advice of counsel, to answer certain questions upon cross-examination, and alleged error in admitting the deposition, cannot be injurious error, where the testimony of the witness related only to his disposition of the moneys received by him, and not to the genuineness of the orders, and it is manifest that if the deposition had been excluded, and any finding thereon eliminated, the judgment must be the same upon the conclusive finding as to the genuineness and authentication of the orders. (*Id.*)

See Appeal, 8, 12, 13; Contract, 7-10; Corporations, 10; Ejectment, 2; Findings, 1, 2; Mechanics' Liens, 1.

FRAUD.

1. **INJUNCTION—EXECUTION SALE—INTERVENTION BY CREDITOR—COMPLAINT TO CANCEL FRAUDULENT DEEDS—FINDINGS AGAINST INTERVENOR—CONSIDERATION IMMATERIAL.**—In an action to enjoin the sheriff from selling plaintiff's property on execution against her hus-

FRAUD (Continued).

band, where the execution creditor, without answering the complaint, filed a complaint in intervention to cancel two deeds from the husband to the plaintiff as having been made without consideration, in contemplation of insolvency, to defraud creditors, and the court found for the plaintiff and against the intervener, that there was no fraudulent intent, and that the transfers were made to indemnify plaintiff as surety for the husband, and that he was not then insolvent, and did not contemplate insolvency, the findings show the validity of the deeds, and, as there was in fact no fraudulent intent, it is immaterial whether there was or was not a sufficient consideration for them. (*White v. Besse*, 223.)

2. **FINDINGS—DEED INTENDED AS SECURITY—EXECUTION SALE SUBJECT TO MORTGAGE—COMPLAINT OF INTERVENER LIMITED TO CAUSE OF ACTION ALLEGED.**—Under the complaint of the intervener, which was not addressed to the complaint of the plaintiff, and did not purport to answer the same, the intervener, who alone appeals, cannot avail himself of any denial of the complaint by the defendant, who does not appeal, and his averment that plaintiff never was the owner cannot be deemed a denial of plaintiff's averment that she is the owner. The plaintiff must rest solely on the cause of action to set aside the deeds as fraudulent, and cannot change it so as to seek an execution sale subject to a mortgage, by reason of findings that the deeds were intended as security. Such findings as to the intervener must be deemed to apply solely to the consideration for the deeds. (*Id.*)
3. **ACTION TO SET ASIDE DEED—FRAUD AND UNDUE INFLUENCE—CONFIDENTIAL RELATIONS—APPEAL—SUPPORT OF FINDINGS—PRESUMPTION.**—In an action to set aside a conveyance for alleged fraud and undue influence exercised by the defendant over the plaintiff, in violation of a confidential relation between them, where the judgment is for the plaintiff, it must be presumed upon appeal, in support of the findings of the court, that the court gave full credit to the testimony of the plaintiff, and refused to believe the evidence adduced by the defendant in conflict therewith. (*Gatje v. Armstrong*, 370.)
4. **INADEQUACY OF CONSIDERATION—TAKING ADVANTAGE OF IGNORANCE AND CONFIDENCE.**—Where the defendant took advantage of the highest trust and confidence reposed in him by the plaintiff, and of the ignorance of the plaintiff, to obtain a deed from her to him for a grossly inadequate consideration, a court of equity is warranted in finding that the deed was obtained by fraud, and that the same should be canceled. (*Id.*)
5. **EQUITY—ADJUSTMENT OF ACCOUNTS.**—The defendant having obtained the conveyance by fraud, equity invests him with the character of a trustee for plaintiff, and a court of equity will do complete justice between the parties, and to this end will adjust the accounts between them in relation to the land, and will offset the claim of one against the other, and will not require the plaintiff

FRAUD (Continued).

to restore to defendant money received, where it is shown that the latter has already realized out of the trust estate more than the amount paid by him to the plaintiff in the original transaction. (Id.)

6. **UNNECESSARY TENDER BY PLAINTIFF—RELIEF UNDER GENERAL PRAYER.**—The fact that the plaintiff at one time tendered to defendant what he was not entitled to receive is immaterial; and under the prayer for general relief the court can give such relief as plaintiff was entitled to. (Id.)
7. **FRAUD UPON DIVORCED HUSBAND—ESTOPPEL OF DEFENDANT.**—The defendant will not be permitted to validate his own fraudulent act by showing that the plaintiff, whom he has defrauded, intended by the conveyance to defraud her divorced husband. (Id.)

See Good-Will, 9.

GAS COMPANIES. See Municipal Corporations, 1-3.

GIFT. See Ejectment, 2; Husband and Wife, 1-3, 9.

GOOD-WILL.

1. **INJUNCTION—INTERFERENCE WITH GOOD-WILL OF BUSINESS—FRAUDULENT REPRESENTATIONS AS TO IDENTITY.**—An action may be sustained to enjoin the defendants from attempting by fraudulent representation to the effect that plaintiff's business is defendants' business to appropriate the benefit of the good-will of plaintiff's established business. (Dodge Stationery Company v. Dodge, 380.)
2. **USE OF DEFENDANT'S SURNAME—INTENTION—CONSISTENCY OF FINDINGS.**—Where the plaintiff's established business had used the surname of an individual defendant, as a part of the good-will of the plaintiff's business while he was connected with it, a finding as to his intention to show his connection with the defendant corporation is not inconsistent with a finding that he and his fellow-corporators caused his name to be adopted therein with the intent and for the purpose of defrauding the plaintiff and appropriating to their own benefit the good-will of plaintiff's business. (Id.)
3. **SUPPORT OF FINDINGS.**—Upon a review of the evidence in such action, *held*, that the findings therein for the plaintiff are sustained by sufficient testimony. (Id.)
4. **OWNERSHIP OF GOOD-WILL OF CORPORATE BUSINESS—VENDIBLE INTEREST—RIGHTS OF STOCKHOLDERS.**—The good-will of the business of the plaintiff corporation is the property of the corporation alone, and can be transferred only by it. The defendant, whose surname was used as an essential part of such good-will, and who was a stockholder in the plaintiff corporation, had no vendible interest in its good-will, and could not upon ceasing to be a stockholder transfer such good-will or any part thereof. (Id.)
5. **RIGHT TO USE ONE'S OWN NAME—RESTRICTION.**—Though the stockholder whose name was used by the plaintiff corporation, by his

GOOD-WILL (Continued).

consent, has the right after he ceases to be a stockholder therein to use his own name in the same line of business, if he does so legitimately, and cannot be restrained therefrom by contract; and though the corporation has no proprietary interest in his name, yet it is entitled to the good-will of its business, and he cannot be permitted to injure it by palming off its business as his own. (Id.)

6. **RIGHTS OF TRADING CORPORATION—EXPECTATION OF CONTINUED PATRONAGE—PROTECTION IN EQUITY.**—A trading corporation may, equally with a private person, have a well-founded expectation of continued public patronage, which constitutes the good-will of its business under section 992 of the Civil Code, and may be protected by a court of equity against acts of the character complained of. (Id.)
7. **RIGHT TO USE OF NAME IN FORMING NEW CORPORATION—INTERFERENCE WITH PRIOR CORPORATION WITH SIMILAR NAME.**—Though an individual has the right to do business in his own name, if he does so legitimately, yet he cannot confer upon a new corporation the right to use his name for the purpose of enabling it to engage in a business which had been conducted by a prior corporation under a similar name, which he had caused the prior corporation to use, where the similarity of names would create confusion, and enable the new corporation to obtain the business of the prior corporation. (Id.)
8. **INJUNCTION TO RESTRAIN SIMULATION.**—In such case injunction will lie in favor of the prior corporation against the new corporation, and the defendant whose name is used by it to restrain the simulation so far as may be necessary to protect the rights of the prior corporation. The courts interfere in such cases solely for the purpose of preventing fraud, actual or constructive. (Id.)
9. **ACTUAL FRAUDULENT INTENT NOT ESSENTIAL.**—It is immaterial whether the surname used by the plaintiff in its business was used by the defendant corporation on its signs with actual fraudulent intent. If the natural and necessary consequence of defendant's conduct was such as to cause deception, said defendant, knowing the facts, must be held to the same responsibility, even if it acted under the honest impression that no right of the plaintiff was invaded. (Id.)
10. **USE OF DEFENDANT'S NAME BY PLAINTIFF NOT A MISREPRESENTATION.**—The use by the plaintiff of the corporate name conferred upon it by the act of the individual defendant is not a misrepresentation of the fact that any person of that name is connected with it after he ceased his connection therewith. The name, by his acts, had become so bound up in the plaintiff's business as to indicate the business itself carried on by it; and it indicated nothing more after his retirement. (Id.)

GOOD-WILL (Continued).

11. **EXTENT OF INJUNCTION.**—Though in other respects the injunction granted was warranted by the case presented, it should not go to the extent of enjoining the defendant corporation from using its corporate name in some other line of business, nor should it enjoin the individual defendant in the matter of using his own name in carrying on the stationery business, to any greater extent than is necessary to protect against fraud. (Id.)

GRANTOR AND GRANTEE. See Deed.**HABEAS CORPUS. See Contempt, 1; Extradition, 1.****HOMESTEAD.**

1. **ESTATES OF DECEASED PERSONS—PROBATE HOMESTEAD—RIGHTS OF WIFE.**—The right of the surviving wife to a probate homestead is an independent right which she has in addition to any other right or property which she may have, whether acquired under her husband's will or otherwise. (Estate of Firth, 236.)
2. **DEVISE OF RESIDENCE TO WIFE—HOMESTEAD UPON PROPERTY OTHERWISE DEVISED—JURISDICTION OF COURT.**—The devise to the wife of the house and lot in which the deceased husband lived with her for several years prior to his death, does not affect the jurisdiction of the court to set apart a homestead to her for life out of other separate property of the husband, though devised to other persons. The right to devise is subject to the power of the court to set apart a homestead. (Id.)
3. **QUALIFICATION OF WIFE AS EXECUTOR—HOMESTEAD NOT WAIVED.**—The wife did not waive her right to a probate homestead by qualifying as executrix under the will. (Id.)
4. **IMPROPER PART OF ORDER—DETERMINATION OF TITLE.**—It was improper to include in the order setting apart the homestead a determination of where the title of the property shall vest upon the termination of the homestead. The adjudication should be limited to the question whether the wife should have the homestead. (Id.)
See Estates of Deceased Persons, 20, 21, 28; Execution, 2.

HUSBAND AND WIFE.

1. **ACTION BY EXECUTOR—RECOVERY OF COMMUNITY PROPERTY—DEFENSE OF GIFT TO WIFE—CO-EXECUTOR AS DEFENDANT—SERVICE OF NOTICES.**—In an action by one of the executors of the will of a deceased husband to recover community property from the executrix of the will of a deceased wife, who defended upon the ground of a gift from the husband to the wife, a co-executor of the will of the husband made defendant because he refused to join as co-plaintiff, and who denied the interest of the husband, but against whom no relief was granted, and who is not mentioned in the judgment for plaintiff, is not an adverse party on whom the executrix of the deceased

HUSBAND AND WIFE (Continued).

wife was required to serve her notice of motion for new trial or her notice of appeal. (*Sprague v. Walton*, 228.)

2. **DEPOSITS IN BANK — GIFT — PRESUMPTION — BURDEN OF PROOF — FINDING — SUFFICIENCY OF EVIDENCE.**—Whether deposits in bank of community property in the name of the husband were a gift to the wife depends upon his actual intention, where he did everything necessary to complete a gift thereof if he intended one; but though the evidence seems very strong and persuasive that a gift was intended, yet, the burden of proof being upon the defendant to show a gift from the husband to the wife, a finding to the contrary, resting upon the legal presumption in favor of the husband, cannot be set aside on the sole ground that the finding of no gift is wholly unsupported. (*Id.*)
3. **ERROR IN EXCLUSION OF EVIDENCE — DECLARATIONS OF HUSBAND ACCOMPANYING WRITTEN AUTHORITY TO WIFE.**—Where the husband, while sick and confined to his bed, after having bequeathed everything to his wife, gave to her written authority to withdraw all bank deposits standing to his credit, with the words appended to such written order, "and to have the right of survivorship," it was error to exclude evidence of the oral declarations of the husband, at and about the time he signed the written orders upon which his wife withdrew the deposits, declaratory of his intention to make her a gift of the money. Such declarations do not vary the written contract; and the question is not governed by subdivision 4 of section 1870 of the Code of Civil Procedure, but by subdivision 2 of that section. (*Id.*)
4. **FORM OF ORDERS — "RIGHT OF SURVIVORSHIP" — INDICATION OF TRUST.**—The words "and to have the right of survivorship" in the orders indicate an intention of the husband to create a trust in favor of the wife; and if such was the intention, even if it was not intended that she should withdraw the money until after his death, the bank would be a trustee for her benefit as survivor. The fact that the wife withdrew the money before her husband's death would not defeat the intention to create a trust in her favor. (*Id.*)
5. **RIGHT OF ACTION — PRESUMPTION OF CLAIM — IDENTIFICATION OF DEPOSITS.**—If it shall be found that the deposits did not pass to the wife either as donee or beneficiary of a trust, they may be recovered by the husband's executor, so far as identifiable, without presentation of a claim against the estate of the deceased widow. Upon such supposition, the deposits sued for are not a part of the latter estate, and the action will lie if the thing demanded can be identified in specie as the property of the husband. (*Id.*)
6. **STATUTE OF LIMITATIONS — TRUST — WIDOW AS EXECUTRIX.**—Upon the same supposition, the wife held the money in trust for the husband at his death, and the statute of limitations did not commence to run in favor of the widow while she remained executrix of the will of the deceased husband, regardless of her failure to

HUSBAND AND WIFE (Continued).

include the deposits in the inventory of his estate; and the action to recover the money from the executrix of the deceased widow is not barred by the statute where she was appointed as such less than two years before the action was commenced. (Id.)

7. **ACTION AGAINST EXECUTOR—SERVICES OF MARRIED WOMAN AS NURSE—NONSUIT—EVIDENCE—AGREEMENT FOR SEPARATE PROPERTY—PREJUDICIAL ERROR.**—In an action by a married woman against an executor upon a contract for services rendered by her to the deceased testator in his lifetime as nurse and attendant, where a nonsuit was granted for the main reason that there was no evidence of any agreement between her and her husband to the effect that her personal earnings should be her separate property, it was prejudicial error to refuse to permit evidence by the husband tending to establish such agreement. (*Kaltschmidt v. Weber*, 596.)
8. **INCOMPETENT EVIDENCE OF PLAINTIFF.**—The testimony of the plaintiff concerning the course of conduct of herself and husband with respect to her earnings, relating to matters of fact which must have taken place in the lifetime of the deceased employer, was properly excluded as inadmissible under subdivision 3 of section 1880 of the Code of Civil Procedure. (Id.)
9. **GIFT OF COMMUNITY PROPERTY—SEPARATE PROPERTY—CONSTRUCTION OF CODE.**—The husband may make a gift of community property to the wife, the effect of which is to transmute it into her separate estate. Section 172 of the Civil Code, forbidding the husband to make a gift of community property without the consent of the wife in writing, is for her benefit, and has no application to a gift by the husband directly to the wife. (Id.)
10. **AGREEMENT AS TO PERSONAL EARNINGS—CHANGE OF STATUS.**—The husband may, under sections 158 and 159 of the Civil Code, agree with the wife that her personal earnings, both past and future, shall be her separate property, the effect of which agreement is to convert them from the *status* of community property to that of the wife's separate property. (Id.)
11. **PROOF OF AGREEMENT—MANAGEMENT AND CONTROL OF WIFE'S EARNINGS—EVIDENCE IMPROPERLY EXCLUDED.**—Where the husband testified that he had had an understanding with his wife ever since their marriage as to the control and management of her earnings it was prejudicial error to refuse to allow him to testify as to who had had the management and control of his wife's earnings for a specified period, and not to allow him to testify as to the effect of the agreement or understanding between them. The conduct and actions of the husband with respect to such earnings, indicating that he did not regard them as community property, or that he had relinquished to her the right to control and dispose of her receipts from that source, were competent and admissible evidence to prove the agreement. (Id.)

HUSBAND AND WIFE (Continued).

- 12. UNNECESSARY AMENDMENT TO COMPLAINT—ADMISSIBILITY OF PROOF.**—It was not necessary to amend the complaint so as to allege an agreement of the husband and wife that her earnings should be her separate property in order to render proof thereof admissible. Such proof was admissible under the averment of the original complaint that the deceased was indebted to her for the services in question. (Id.)
- 13. ACTION BY HUSBAND AND WIFE—INJURY TO BUILDING—JOINT OWNERSHIP—EVIDENCE—MOTION FOR NONSUIT.**—In an action by a husband and wife to recover damages for an injury to their building, where issue was joined upon an allegation that they were the owners and possessed of the building and lot upon which it stood, and there was no evidence as to the record title of the property, testimony that the house was built by them, and that they had occupied it for about ten years, was sufficient evidence of joint ownership to justify the court in overruling a motion for nonsuit for failure to prove it. (*Harlow v. Standard Improvement Company*, 477.)
- 14. TENANCY IN COMMON.**—Under section 384 of the Code of Civil Procedure, the plaintiffs as cotenants, or tenants in common, are entitled to maintain the action. (Id.)
- 15. NATURE OF TITLE—CONSTRUCTION OF CODE—ABSENCE OF PRESUMPTION.**—Under section 161 of the Civil Code, the husband and wife may hold property as joint tenants, tenants in common, or as community property; and in the absence of any evidence as to the source of the moneys with which the house was built, or of the manner in which the property was acquired, there is no presumption that it was community property or the separate property of either spouse, rather than that it was held by them in joint tenancy, or tenancy in common. (Id.)

See Divorce; Homestead; Parent and Child.

INJUNCTION.

- 1. ACTION FOR INJUNCTION—THREATENED OUSTER—THREATENED TRESPASS TO PERSONAL PROPERTY.**—An action will not lie to restrain a mere threatened ouster of the plaintiff from rooms alleged to be in his possession where there is nothing to show that the threatened injury would be irreparable. Nor will an injunction lie to restrain threatened injury to plaintiff's furniture and the threatened removal therefrom from the premises. (*Krede v. Phelps*, 514.)
- 2. FINDINGS AND JUDGMENT UNSUPPORTED BY PLEADINGS.**—The plaintiff must recover, if at all, upon the cause of action alleged, and not upon some other which may be developed in the proofs. Where the complaint alleged that plaintiff was in the quiet and peaceable possession of the premises, and there was no cross-demand or claim for rent, findings, showing an ouster from the premises and a judgment that he be restored to possession, and should pay defendant

INJUNCTION (Continued).

a certain rent for the premises, are wholly unsupported by the pleadings and outside of the issues. (Id.)

See Fraud; Good-Will; Nuisance; Pleading, 2.

INSANITY. See Criminal Law, 13, 51, 52.

INSOLVENCY. See Banks.

INSTRUCTIONS. See Assault and Battery, 4; Criminal Law, 13, 18, 25, 37-40, 53, 55-57, 65-72.

INSURANCE.

1. **INSURANCE—ACCIDENT POLICY—CONDITION FOR RETURN OF PREMIUM—FATAL INJURY TO INSURED WHILE INSANE.**—Under a policy of accident insurance, providing that if the death of the insured shall result from an injury within ninety days from the time the injury was received, the company would pay the whole amount insured to the surviving wife, but containing a condition that only the amount of the premium paid should be returned if an "injury was received by him while insane," the company is only liable for a return of premium, where the assured, while insane and confined in the Mendocino State Hospital, fell against a steam radiator and received injuries from which he died within ninety days. (*Blunt v. The Fidelity and Casualty Company*, 268.)
2. **CONDITIONS IN POLICY—ASSENT OF ASSURED.**—The company may insert conditions in the policy not mentioned in the application. If not satisfactory, the contract, consisting of the application and policy, may be rescinded; but where the policy containing new conditions is accepted without objection, and renewed, the conditions must be deemed assented to, and the policy cannot afterwards be avoided by the assured or the beneficiary. (Id.)
3. **CONSTRUCTION OF POLICY.**—The court in construing an insurance policy resolves every ambiguity and uncertainty in favor of the assured; but where the words are clear and free from uncertainty, and the meaning plain, the contract as made by the parties is beyond the power of the court to change by a forced construction. (Id.)
4. **VALUE OF USE AND OCCUPATION—ABSENCE OF PROOF.**—The plaintiff **INSANITY.**—The condition in the policy providing that "in case of injuries fatal or otherwise *intentionally* inflicted upon himself by the assured, or inflicted upon himself or received by him *while insane*, the measure of the company's liability shall be a sum equal to the premium paid," the word "*intentionally*" expressed in the second clause. The policy makes the insane condition, and not the volition of the assured, the test of non-liability under the second clause, except for the premium paid. (Id.)

See Execution, 1-3.

INTEREST. See Judgment, 6.

INTERVENTION. See Fraud, 1, 2.

JUDGMENT.

1. **DENIAL OF MOTION TO VACATE—DISCRETION—APPEAL.**—Upon appeal from an order denying a motion to vacate a judgment for mistake, under section 473 of the Code of Civil Procedure, the sole question is whether the discretion of the trial court was abused, and if no such abuse plainly appears, the order will be affirmed. (*Alderitz v. Cahen*, 397.)
2. **JUDGMENT BY DEFAULT—COPARTNERS JOINTLY SUED—MISTAKE OF ATTORNEY.**—*Held*, that under the facts of the case it cannot be said that there was an abuse of discretion in denying a motion by one of two defendants sued jointly as copartners to set aside a judgment by default for mistake of their attorney in not remembering that both defendants were sued, and in making default under the instructions of one of them, who had no ability to pay the judgment, nor to defend the action. (*Id.*)
3. **ATTORNEY AND CLIENT—QUESTION OF NEGLIGENCE AND MISTAKE OF ATTORNEY—CLIENT BOUND, NOTWITHSTANDING HARDSHIP.**—Where questions of negligence and mistake of an attorney arise, there must always come a time when, notwithstanding the hardship to the client, he must be bound by the errors or omissions of his attorney. (*Id.*)
4. **ACTION UPON FOREIGN JUDGMENT—PLEADING—JURISDICTION OF FOREIGN COURT—ABSENCE OF DEMURRER.**—In an action upon a foreign judgment in English money, made and entered in the Queen's Bench division of the high court of justice of the supreme court of judicature in England, a complaint averring that said court, "had jurisdiction of the subject-matter of said action and of the parties thereto," and that said judgment "was duly given, made, and entered" in and by said court, is sufficiently certain, in the absence of a demurrer, on the subject of jurisdiction in the English court. (*Murphy v. Murphy*, 482.)
5. **GENERAL FINDINGS—JURISDICTION INVOLVED.**—Where the findings are that all of the allegations of the complaint are true, they sufficiently show the jurisdiction of the court in which the judgment sued on was rendered. (*Id.*)
6. **VALUE OF JUDGMENT—RATE OF INTEREST—PRESUMPTION.**—Where the complaint alleged the value of the English judgment in lawful money of the United States, and alleged that it was wholly unpaid, and prayed for interest thereon at the rate of seven per cent per annum from the date of the judgment, the complaint is sufficient as to the value of the judgment, and it must be presumed that the law of England as to interest on the judgment is the same as the law of this state in the absence of evidence to the contrary, and

JUDGMENT (Continued).

the interest prayed for was properly allowed in computing the amount of the judgment. (Id.)

See Appeal, 1-8, 9-18; Assignment, 1, 2; Contempt, 1; Execution, 4-7; Findings, 2; Mechanics' Liens, 1; Street Assessment, 3, 4.

JURISDICTION. See Certiorari; Contempt, 3; Estates of Deceased Persons, 28-30; Judgment, 4, 5; Summons, 1; Trusts, 4, 5.

JURY AND JURORS. See Assault and Battery, 1; Certiorari; Contempt, 1, 2; Criminal Law, 42-48.

LANDLORD AND TENANT.

1. **ACTION FOR RENT—VERBAL AGREEMENT FOR LEASE—CONFLICTING EVIDENCE—SUPPORT OF FINDING.**—In an action for rent, where the plaintiff testified to a verbal agreement with the defendant to rent grazing-lands for a year, and the defendant testified that he positively declined to rent them for a year, but made overtures to plaintiff for a lease of three or five years, and that, being unable to secure it, he left the premises, a general finding that defendant was not indebted to plaintiff in any sum is sustained by the evidence, and is conclusive upon appeal. (Ambrose v. Hyde, 555.)
2. **TENANCY OF AGRICULTURAL LANDS—CONTINUED OCCUPATION—PRESUMPTION—REBUTTAL.**—Subdivision 2 of section 1161 of the Code of Civil Procedure creates a presumption of law merely from the continued occupation by a tenant of agricultural lands for more than sixty days after the term, as to the continuance of the lease upon the same terms as the lease of the previous year; and it is permissible for either of the parties to rebut the legal implication arising thereunder from such continued occupation. (Id.)
3. **CONTINUED OCCUPATION BY SUBTENANT—FAILURE OF PROOF OF ORIGINAL TERMS OF LEASE.**—Assuming, without deciding, that such presumption of law applies to a subtenant who remains sixty days after the term, yet where there is no evidence to show what were the terms of the previous lease as to the amount of rental to be paid thereunder, the absence of such evidence is fatal to the claim of a continuance of the lease by operation or presumption of law. (Id.)
4. **VALUE OF USE AND OCCUPATION—ABSENCE OF PROOF.**—The plaintiff cannot recover the value of the use and occupation of the premises for the time during which they were occupied by the subtenant after the term where he failed to make any proof of such value. (Id.)
5. **EVIDENCE—INADMISSIBLE CONVERSATIONS.**—Conversations had between the plaintiff and the wife of his assignor concerning the rental of the premises to the defendant, and had by her with others who

LANDLORD AND TENANT (Continued).

tried to rent them, none of which were in the presence of the defendant, were inadmissible, and when given were properly stricken out. (Id.)

LIS PENDENS. See *Street Assessment*, 1.**MANDAMUS.**

WRIT OF MANDATE—ARREST FOR MISDEMEANOR—APPLICANT NOT INTERESTED.—An applicant for a writ of mandate to compel the arrest of a person accused by his complaint, filed in the justice's court, of a misdemeanor in unlawfully using a slot machine for a game of chance, is not a party beneficially interested, within the meaning of the statute. He is not injured thereby in any manner different from the general public, and his application for such writ was properly denied by the superior court. (*Fritts v. Charles*, 512.)

See *Criminal Law*, 1, 2; *Estates of Deceased Persons*, 30, 32; *Municipal Corporations*, 10-12; *New Trial*, 9, 10.

MASTER AND SERVANT.

1. **AGREED WAGES—CONTINUANCE AFTER TERM—PRESUMPTION OF RENEWAL.**—Where a master and servant have agreed upon a certain rate of wages for a fixed term, and the parties continue the relation of master and servant after the term, they are presumed, under section 2012 of the Civil Code, to have renewed the agreement for the same wages and term. (*Gabriel v. Bank of Suisun*, 266.)
2. **EMPLOYMENT BY BANK FOR YEAR AT MONTHLY SALARY—RENEWAL—FINDING—CONFLICTING EVIDENCE.**—Where the plaintiff was employed by the defendant bank as its cashier and bookkeeper for one year at a monthly salary, and the plaintiff's testimony was in accordance with the presumption of continuance at the same salary for succeeding years until he was discharged pending a succeeding year, in an action for damages for breach of the contract a finding in favor of the plaintiff upon conflicting evidence cannot be disturbed upon appeal. (Id.)
3. **MINUTES OF DIRECTORS UNKNOWN TO PLAINTIFF.**—The minutes of the directors of the defendant bank unknown to the plaintiff as one of the contracting parties cannot be considered as conclusive evidence of the terms of the contract for further employment. (Id.)
4. **RESCISSION—SUPPORT OF FINDINGS.**—Where the evidence was conflicting as to whether the contract of employment was rescinded after two months' employment in the last year by mutual consent, but there was sufficient evidence to support a finding to the contrary, the finding must stand. (Id.)

See *Negligence*, 17-24.

MEASURE OF DAMAGES. See *Damages*.

MECHANICS' LIENS.

1. **FORECLOSURE—FINDING AS TO LIEN FOR ATTORNEYS' FEES—SUPPORT OF JUDGMENT—ISSUES—NEW TRIAL.**—In an action to foreclose mechanics' liens, a finding of fact, upon which the land of the owner was charged with a lien for attorneys' fees, to the effect that after payment of the fund into court the owner had entered into a contest with certain claimants as to the disposition of the fund, which finding is necessary to support the judgment for such lien, is not outside of the issues upon which the court was called upon to pass, and is reviewable upon motion for new trial, on the ground that such finding is unsupported by the evidence. (*Hooper v. Fletcher*, 375.)
2. **APPEAL FROM ORDER GRANTING NEW TRIAL—REVIEW OF ORDER—NEW TRIAL AS TO ATTORNEYS' FEES AND COSTS.**—Where the order granting a new trial generally was made, after failure of the plaintiffs to comply with an order to the effect that it would be granted if attorneys' fees were not remitted, the order granting a new trial for insufficiency of the evidence to sustain a finding thereupon will be affirmed, so far as it grants a new trial upon the issue as to attorneys' fees and costs, and the respondents will be allowed to recover their costs of appeal. (*Id.*)
3. **OWNER, WHEN NOT LIABLE FOR INTEREST OR COSTS.**—Where the building contract appears to be valid and the owner before the trial of actions to foreclose mechanics' liens pays the residue of the fund properly remaining in his hands as due to the contractor, to be applied toward payment of the claimants of liens, the owner is not liable for interest or costs. (*Id.*)
4. **BUILDING CONTRACT—VOID BOND OF CONTRACTOR—UNCONSTITUTIONAL SECTION OF CODE.**—Section 1203 of the Code of Civil Procedure is unconstitutional, and a bond given in pursuance of it under a building contract is void, and cannot be upheld as a common-law obligation. (*Montague & Co. v. Furness*, 205.)
5. **CONSTRUCTION OF PART OF SEWER—PRIVATE CONTRACT BY LOTOWNERS—CONSTRUCTION OF CODE—ENFORCEMENT OF LIEN—JURISDICTION.**—A system of sewers is an improvement to lots within the sewer district, and where the lotowners within part of a sewer district established by a town made a private contract for the construction of the sewers according to the proper plans and specifications of the town, in proportion to frontage on their lots, the contractor has a lien under section 1191 of the Code of Civil Procedure upon each lot for the price which the owner has agreed to pay therefor, which the court has jurisdiction to enforce, regardless of the amount thereof. [*Shaw, J., and Angellotti, J., dissenting.*] (*Williams, Belser & Co. v. Rowell*, 259.)

MINES AND MINING.

1. **MINING CLAIM—LOCATION—EFFECT OF STATE LAW—VALED LOCAL RULES.**—The state law of March 27, 1897, respecting the contents of

MINES AND MINING (Continued).

location notices, and the record thereof within limited periods, was valid as being a local regulation authorized by the act of Congress, and so long as it was unrepealed was obligatory upon locators of mining claims in this state. But if the Revised Statutes were otherwise complied with, a compliance with the state law might be had at any time while the statute was in force, if there were no intervening rights. (*Dwinnell v. Dyer*, 12.)

2. **VOID TECHNICAL LOCATION.**—A mere technical location of a mining claim during the existence of the state law, without compliance therewith, and without any attempt to work or develop the claim, in compliance with the Revised Statutes, is wholly invalid, and a deed thereof conveys no title. (*Id.*)
3. **EFFECT OF REPEAL UPON LOCATION OTHERWISE VALID—ACTUAL POSSESSION TO BOUNDARIES—SUBSEQUENT LOCATION.**—The repeal of the state law had the effect thereafter to dispense with its requirements, and work thereafter done under a prior location otherwise valid, and properly maintained under the Revised Statutes, had reference to the boundaries marked in accordance therewith, and constituted actual possession of the claim to the extent of those boundaries, which precluded a valid conflict therewith under a subsequent location. (*Id.*)
4. **ACTION TO QUIET TITLE—FINDINGS AGAINST EVIDENCE—INCONSISTENCY—DECISION AGAINST LAW.**—Where the defendants in an action to quiet title claimed under a location of mining ground made while the state law was in force, but which was perfected by actual possession and work under the Revised Statutes after repeal of the state law, and plaintiff claimed under a subsequent location, *held*, that findings that the mining ground possessed by the defendants was public mineral land of the United States when plaintiff made his location, and that his location conflicting with defendants' claim was valid, are against the evidence, inconsistent with other specific findings and with certain averments of the complaint, and also that the decision is against law, in failing to find upon the material issue whether defendants' location was not perfected as a good claim prior to plaintiff's location. (*Id.*)
5. **CASE DISTINGUISHED.**—The case of *Beik v. Meagher*, 104 U. S. 270, distinguished, and held not to be controlling authority in support of the decision in favor of plaintiff's location. (*Id.*)

MISTAKE. See Bill of Exceptions; Judgment, 1-3.

MORTGAGE.

1. **EJECTMENT—TITLE UNDER FORECLOSURE—PARTIES—HOLDER OF UNRECORDED DEED—CONCLUSIVENESS OF DECREE—EVIDENCE—KNOWLEDGE OF DEED.**—In an action of ejectment to recover land sold to the plaintiff as mortgagee under a decree for the foreclosure of the

MORTGAGE (Continued).

mortgage, a defendant who was the holder of an unrecorded deed from the mortgagor when the foreclosure suit was commenced need not have been made a party thereto, and is concluded by the decree; and evidence is admissible on his behalf to show that the plaintiff had actual knowledge of the unrecorded deed before such suit was commenced. (*Hager v. Astorg*, 548.)

2. **INSUFFICIENT DEFENSE—EXECUTED TRUST.**—The court also properly excluded evidence of an insufficient defense by the holder of the unrecorded deed, to the effect that the plaintiff knew when the mortgage was executed that the mortgagee held the legal title in trust for him, it further appearing from the answer that the trust had been executed and terminated by the unrecorded deed about two years before the foreclosure of the mortgage. (*Id.*)
3. **OTHER DEFENSES—ADJUDICATION BY DECREE—INADMISSIBLE EVIDENCE.**—Defenses that the foreclosure suit was prematurely brought before the debt was due, and that the amount of interest claimed was not due, and that the mortgagee had agreed to release the holder of the unrecorded deed, and to look to the mortgagor alone, were necessarily adjudicated by the decree of foreclosure, and evidence was properly excluded in proof thereof. (*Id.*)
4. **ORDER OF SALE—ABSENCE OF SEAL—CERTIFIED COPY OF DECREE—AUTHORITY TO SHERIFF—COLLATERAL ATTACK.**—An order of sale issued under the signature of the clerk, without a seal attached thereto, but which embodies a certified copy of the decree of foreclosure, certified under the seal of the court, is not void, and is at most erroneous and amendable, and cannot be attacked collaterally. Such order was sufficient authority to the sheriff to sell and convey the mortgaged premises as against persons concluded by the decree, and cannot be assailed in an action of ejectment by one so concluded. (*Id.*)
5. **DEED ABSOLUTE—EVIDENCE OF PURCHASE—RECEIPTS—CONTRACT OF SALE.**—Where there was a controversy as to whether a deed absolute in form, under which plaintiff claims title, was intended as a mortgage or as an absolute grant for purchase money, evidence is admissible for the plaintiff to show receipts for purchase money and a contract for the sale and purchase of the land, in proof of his title under the deed. (*Holmes v. Warren*, 457.)
6. **DEBT ESSENTIAL TO MORTGAGE BY DEED—BURDEN OF PROOF—SUPPORT OF FINDING.**—A subsisting debt after the conveyance is essential to constitute it a mortgage, and the burden is on the one claiming it to be a mortgage to prove it by clear evidence. Where such burden is not sustained, but the evidence shows that there was no subsisting debt, a finding that the deed was intended as an absolute conveyance for the consideration expressed, and that it was not executed and delivered as security for any obligation, is sufficiently supported. (*Id.*)

MORTGAGE (Continued).

7. **DEED INTENDED AS MORTGAGE—ACTION FOR RECONVEYANCE—ACCOUNTING—IMPROPER CREDIT ON FAMILY ALLOWANCE.**—Where a widow, pending the administration of the estate of her deceased husband, made a deed of an undivided half of her interest in the estate to one whom she had constituted her general manager, and sued for a reconveyance of the property and for an accounting against his executors for moneys received by him as agent and trustee, where the court found that the deed was intended as a mortgage to the grantee, and an accounting of the indebtedness was had, the court improperly allowed a credit to the executors of money paid by the mortgagee as manager to a grantee of the other half of the widow's interest in the estate of her husband out of the family allowance made to her as widow by the court. (*De Leonis v. Walsh*, 199.)
8. **RIGHT OF GRANTEE OF WIDOW—CONTRACT.**—The grantee of the widow had no right as such to any part of the family allowance, and a contract by him to use his best endeavors to procure a proper monthly allowance to be made to her out of the estate for her support and maintenance conferred no such right, whether the contract is or is not deemed to refer to a family allowance to be made by the court. (*Id.*)
9. **PAYMENT—IMPROPER DISALLOWANCE.**—Where the effect of the pleadings and of the uncontradicted evidence of the plaintiff establishes that she is entitled to a credit in the accounting of a certain sum paid to the mortgagee on account of her indebtedness, a credit for such payment was improperly disallowed. (*Id.*)
10. **FORECLOSURE—TAX ON SECOND MORTGAGE—SALE TO STATE—REDEMPTION—PERSONAL LIABILITY.**—One who has foreclosed a prior mortgage, making a second mortgagee a party, and becomes purchaser under the sale, is not a party to the security of the second mortgage within the meaning of section 4 of article XIII of the constitution and section 3627 of the Political Code; and where such purchaser redeemed the land from sale under taxes levied upon the second mortgage he cannot recover the amount so paid from the second mortgagee, who was not personally liable for such taxes not bound to refund the amount so paid to such purchaser, with whom he had no contractual relation. (*Henry v. Garden City Bank and Trust Company of San Jose*, 54.)
11. **FORECLOSURE OF MORTGAGE—BUILDING AND LOAN ASSOCIATION—CASH SURRENDER VALUE OF SHARES—PLEADING—IRRELEVANT MATTER IN ANSWER.**—In an action by a building and loan association to foreclose a mortgage stipulating that upon default the mortgagee may apply the cash surrender value of the shares pledged as security, upon application of which such shares shall vest in the mortgagee, where the complaint alleges the cash surrender value of the certificate representing such shares, a portion of the answer not denying the cash surrender value alleged, but merely averring that

MORTGAGE (Continued).

- the affairs of the corporation have been corruptly managed by one who is its secretary and manager, and that if its affairs had been properly managed the cash surrender value would be greater, is irrelevant, and was properly stricken out as such. (*Continental Building and Loan Association v. Boggess*, 80.)
12. **ANSWER SETTING UP DEFENSE—IRRELEVANT MATTER.**—Where the answer, besides containing irrelevant and evidential matter, sets forth a sufficient defense, only the irrelevant matter should be stricken out, and it is error to strike out the defense. (*Id.*)
13. **STRIKING OUT VERIFIED ANSWER AS SHAM.**—A verified answer setting up a defense to the action was improperly stricken out as sham, where the answer was not shown to be unquestionably false in fact, and not pleaded in good faith. (*Id.*)
14. **NATURE OF DEFENSE—MORTGAGE ON MINING PROPERTY—PAYMENT OUT OF PROCEEDS.**—Where the plaintiff's mortgage was upon mining property of the defendant, facts properly alleged in the answer showing an agreement that when plaintiff had realized sufficient money out of the mining property plaintiff would pay to the defendant an amount equaling the mortgage debt, and that plaintiff did realize the requisite sum of money, and thereby became equitably bound to apply it in payment of such debt, states a sufficient defense to the action of foreclosure. (*Id.*)
15. **ACTION TO FORECLOSE MORTGAGE—DEFENSE NOT GOING TO MERITS—DISMISSAL FOR WANT OF PROSECUTION—ABUSE OF DISCRETION—ASSIGNMENT BY PLAINTIFF.**—In an action to foreclose a mortgage, where the answer made no defense to the merits, but merely questioned the amount of attorney's fees, and pleaded an assignment of the cause of action by the plaintiff before suit, it was an abuse of discretion to dismiss the cause for want of prosecution on motion of the defendants where it appeared that the defendants made no effort to have the case set down for trial, and that the assignment was at first by way of pledge, and was not made absolute until several months before notice of the motion to dismiss, and that diligent efforts were made on behalf of plaintiff and the assignee to settle the suit. (*Merced Bank v. Price*, 436.)
16. **BURDEN OF PROOF UPON DEFENDANTS.**—The burden of proving the matters in avoidance pleaded by the defendants was upon them. (*Id.*)
17. **AFFIRMATIVE SHOWING NOT CONTROVERTED—APPLICATION BY ASSIGNEE.**—Where at the hearing of the motion to dismiss there was an affirmative showing on the part of the plaintiff, which was not controverted, that the action was properly brought and continued up to that time, and that an application was made by the assignee, who had become the absolute owner of the note and mortgage, for a substitution as party plaintiff, and that the action proceed to trial, such application should have been granted, and the action allowed to proceed as requested. (*Id.*)

MORTGAGE (Continued).

See *Bona Fide Purchaser*, 6; *Estates of Deceased Persons*, 20, 21; *Statute of Limitations*; *Trusts*, 1-3.

MUNICIPAL CORPORATIONS.

1. **POWER TO REGULATE GAS-RATE—VALIDITY OF ORDINANCE—CONSTITUTIONAL LAW.**—A municipal ordinance in a county of the fifth class fixing a maximum rate for gas, and providing a punishment for violation of the same, is valid under section 19 of article XI of the constitution, construed in connection with the Municipal Corporation Act. (*Denninger v. Recorder's Court of City of Pomona*, 638.)
2. **CERTIORARI—GAS FOR COOKING, HEATING AND ILLUMINATING PURPOSES—CONVICTION—JURISDICTION OF RECORDER'S COURT.**—A writ of *certiorari* will not lie to review and annul a conviction under such ordinance under a complaint charging the defendant with collecting and receiving a greater rate than the maximum rate allowed by the ordinance for gas furnished in the pipes laid in the streets for cooking, heating and illuminating purposes. It is sufficient that the complaint charged a public offense, for collecting and receiving an excessive rate for illuminating purposes, within the jurisdiction of the recorder's court. (Id.)
3. **RIGHT OF CITY UNAFFECTED BY USE.**—The right of the city to fix the rate for gas is unaffected by the use which is made of it. It covers all gas furnished through pipes laid in the street. [*Per Beatty, C. J., and Van Dyke, J.; the majority of the court expressing no opinion.*] (Id.)
4. **CONSTRUCTION OF CONSTITUTION.**—Section 19 of article XI of the constitution does not specifically include gas for heating or cooking; but under section 11 of article XI of the constitution the city has the proper public authority to make the regulations here in question. [*Per Shaw, J.*] (Id.)
5. **ORDINANCE REGULATING GAS-RATES—MISDEMEANOR—CONSTITUTIONAL LAW—MUNICIPAL CORPORATION ACT.**—A municipal ordinance passed by a municipal corporation of the fifth class, regulating gas-rates and establishing a maximum rate, and declaring it a misdemeanor to collect or receive more, is constitutional and valid. If it is not authorized by the grant of police power made in section 11 of article XI of the constitution, it is authorized by section 19 of article XI of the constitution, empowering municipal corporations to fix gas-rates for persons or companies laying pipes therein, construed in connection with the Municipal Incorporation Act, providing for ordinances and empowering cities of the fifth class to impose fines, penalties, and forfeitures for the violation of ordinances. (*Denninger v. Recorder's Court of City of Pomona*, 629.)
6. **CONSTRUCTION OF CONSTITUTION—MANDATE UPON LEGISLATURE.**—Whatever may be the interpretation of section 33 of article IV of

MUNICIPAL CORPORATIONS (Continued).

the constitution, laying a mandate upon the legislature to regulate charges for services performed and commodities furnished by telegraph and gas corporations, the failure of the legislature to act under that section will not render nugatory the right granted by section 19 of article XI thereof to municipal corporations, re-enforced by a prescribed method for its exercise, and by so much legislation as is absolutely necessary to supply its deficiencies. (Id.)

7. **PUNISHMENT FOR MISDEMEANOR—POWER OF LEGISLATURE—REASONABLE FINE.**—Whatever the legislature may punish as a misdemeanor it may authorize a municipal corporation to punish as a misdemeanor. A fine for three hundred dollars for violation of an ordinance fixing a maximum rate for gas is not unreasonable. (Id.)
8. **COLLECTION FOR CORPORATION—OPERATION OF ORDINANCE.**—Where the ordinance by its terms applies to any person who collects or receives more than the maximum rate for gas, the fact that the defendant convicted of misdemeanor was collecting as agent for a corporation cannot render the complaint for misdemeanor insufficient. The corporation must act through the agency of natural persons, to whom the ordinance applies. (Id.)
9. **WRIT OF REVIEW—JURISDICTION OF RECORDER'S COURT.**—If a complaint under a municipal ordinance should fail to allege facts constituting one of the offenses to which the jurisdiction of the recorder's court is confined, a judgment of conviction may be reviewed and annulled upon *certiorari*; but where it appears that it has jurisdiction over the offense charged, its judgment must be affirmed. (Id.)
10. **FREEHOLDERS' CHARTERS—TIME FOR SUBMITTING AMENDMENTS—CONSTRUCTION OF CONSTITUTION—MANDAMUS.**—Section 8 of article XI of the constitution, providing that a ratified freeholders' charter "may be amended at intervals of not less than two years by proposals therefor, submitted by the legislative authority of a city to the qualified electors thereof at a general and special election," etc., has sole reference to the intervals between elections upon proposed amendments; and the submission of a proposed amendment at a general election to be held within less than two years after a prior special election, at which amendments to the charter were submitted and approved, is invalid, and cannot be enforced by writ of mandate. (Harrison v. Roberts, 173.)
11. **"LEGISLATIVE AUTHORITY OF CITY"—MAYOR NOT INCLUDED.**—The mayor is not included in the "legislative authority of a city," within the meaning of section 8 of article XI of the constitution; and a proposed amendment to the freeholders' charter of the city and county of San Francisco, proposed by the board of supervisors, which constitutes the "legislative authority" thereof, need not be presented to the mayor for his approval. (Id.)
12. **AMENDMENT OF CITY CHARTER—CONSTITUTION—TIME FOR ELECTION—DISCRETION OF MUNICIPAL LEGISLATURE—MANDAMUS.**—Under sec.

MUNICIPAL CORPORATIONS (Continued).

tion 8 of article XI of the constitution, where amendments to a municipal charter are petitioned for by fifteen per cent of the qualified voters of the city, the legislative authority of the city, though required to submit the same to the voters thereof, has discretion either to call a special election or to wait until the next general election to submit the proposed amendments to a vote of the people; and *mandamus* will not lie to control that discretion by compelling the ordering of a special election. (Lubliner v. Alpers, 291.)

See Office and Officers; Police Court.

MURDER AND MANSLAUGHTER. See Criminal Law, 32-37.

NAME. See Good-Will.

NEGLECTANCE.

1. **ACTION FOR DEATH—BURSTING OF BOILER—REPAIRS—NEGLECTANCE OF ENGINEER—FAILURE TO APPLY BURSTING TEST.**—In an action by heirs for the death of an intestate caused by the blowing off of the mud-drum of defendant's boiler, while the deceased was employed as a fireman by the defendant, owing to the negligence of defendant's engineer in failing to employ the bursting test after repairs, the negligence of the engineer whose duty it was to look after the engine and boiler, in failing to see that the boiler was kept in a safe condition, was the negligence of the defendant. (Shea v. Pacific Power Company, 680.)
2. **PROVINCE OF JURY—CUSTOM AS TO TEST—RELIEF OF WITNESSES—CIRCUMSTANCES.**—The jury were not bound to take the statement of two witnesses that the bursting test was not usual or customary, as against that of one witness to the contrary, corroborated by the circumstances, showing that it had been treated as the usual and proper test of the boiler in question; and it cannot be held as matter of law under the evidence that it was not necessary or customary to apply the bursting test. (Id.)
3. **NECESSITY FOR BURSTING TEST.**—If it was necessary to apply the bursting test after the boiler had been originally set up and the mud-drum had been coupled to it, it was equally necessary to apply the same test after the repairs were made as disclosed by the evidence. (Id.)
4. **REPAIRS BY INDEPENDENT CONTRACTOR—LIABILITY OF OWNER—REASONABLE DILIGENCE—QUESTION OF FACT.**—The owner of an engine and boiler is absolved from liability on account of the bursting of a boiler merely because an independent contractor was procured to repair it; but the question whether he had used reasonable diligence to keep it in a safe condition, or whether the death was the direct and proximate result of a want of ordinary care on the part of the engineer, was a question of fact for the jury. (Id.)

NEGLECTANCE (Continued).

5. **EVIDENCE—FORMER CONDITION OF PACKING-RINGS—OFFER.**—It was not error to overrule an objection to evidence of the plaintiff as to the condition of the packing-rings and their efficiency for preventing the oil from getting into the boiler a year or two before the accident, coupled with a statement that it would be shown that this condition of things continued down to the time of the accident. (M.)
6. **DENTISTS—MALPRACTICE—PERMANENT INJURY TO JAW—SUPPORT OF VERDICT—CONFLICTING EVIDENCE.**—In an action against a dentist for malpractice, where there is no room for doubt that the extraction of a tooth resulted in serious and permanent injury to plaintiff's jaw, and if the jury believed the testimony of the plaintiff they could not well avoid finding the malpractice averred, the verdict is sufficiently supported, notwithstanding there might be different conclusions from the evidence as to whether the injury was caused by the careless and unskillful conduct of the defendant. (*Mernin v. Cory*, 573.)
7. **INSTRUCTION—ADVICE NOT TO CONSULT PHYSICIAN—AGGRAVATION OF INJURIES.**—Where there was evidence to which it was applicable the court properly instructed the jury to the effect that they might take into consideration on the question of damages the facts, if found to be true from the evidence, that her jaw was carelessly and negligently injured by the defendant, that defendant, after her jaw was injured, advised plaintiff not to consult a surgeon or secure medical treatment, that plaintiff, relying upon such advice, delayed to consult a physician or surgeon, and that, by reason of such delay, her injuries were aggravated and became permanent and incurable, and affected her general health, and rendered her unable to work and support herself as she did before she was injured by the defendant. (Id.)
8. **DUTY OF DEFENDANT AS TO ADVICE.**—It was the duty of the dentist, though not a physician or surgeon, to give proper advice, and he should have such knowledge of the very bone out of which he extracts a tooth as to enable him to understand whether it has been so injured as to require treatment beyond his skill. (Id.)
9. **CARELESSNESS OF ADVICE—OTHER INSTRUCTIONS GIVEN AS TO CARELESSNESS.**—It was not necessary to instruct the jury that the advice was carelessly and negligently given, where other instructions clearly informed the jury that carelessness or unskillfulness must have attended all the acts of the defendant so as to make him liable. (Id.)
10. **PLEADING—WILLFUL INTENT TO DECEIVE—PROOF—INSTRUCTION AS TO DAMAGES.**—An averment in the complaint that the advice was given "with willful intent to deceive" is superfluous, except upon the question of punitive damages, and the proof of want of reasonable care or skill was sufficient to maintain the action for actual

NEGLIGENCE (Continued).

damages, without any evidence of willfulness, and the instruction as given was not erroneous because of such averment. (Id.)

11. EVIDENCE—CLICKING JAW.—Where the plaintiff testified that a popping or clicking of her jaw commenced immediately after the alleged acts of malpractice, claiming that it was produced thereby, although there was evidence to show that such condition might be produced from other causes, it was proper to exclude the evidence of other witnesses that they had popping or clicking jaws. (Id.)
12. INJURY THROUGH NEGLIGENCE—CARELESS USE OF STEAM-ROLLER—MAXIM.—Where it appeared that the injury occurred by the use of a steam-roller by the defendant in street-work, which was carelessly allowed to run against the building of plaintiffs and to injure it and the fences, sidewalk, shrubbery, and lawns surrounding it, the manner in which the injury was caused sufficiently sustains the finding of the jury that it was through the negligence of the defendant. The case is one in which the maxim *Res ipsa loquitur* is peculiarly applicable. (Harlow v. Standard Improvement Co., 477.)
13. OFFER OF DEFENDANT TO REPAIR INJURY—PLEADING—INADMISSIBLE EVIDENCE.—The offer on the part of defendant to show that forty-eight hours after the injury it offered to put the building back in as good condition as it was before or to defray the expenses thereof was properly refused, where there was no issue presented by the answer that the cost would have been less to the defendant if the repairs were made by it rather than by the plaintiffs or their employees, and there was no showing to that effect. (Id.)
14. INAPPLICABLE RULE.—The rule which obtains in actions for damages for breach of contract, that it is the duty of the injured, if within his power to protect himself against any increase of damage that may accrue after the breach, has no application where the damage to the premises of the plaintiffs through the negligence of the defendant is complete at the time of the injury. (Id.)
15. INSTRUCTIONS—PROMPT REPAIRS—CHANGE OF RESIDENCE AFTER SUIT.—Where the jury were instructed that if plaintiffs could have prevented any loss by prompt repairs they were bound to do so, and that they could only recover for actual damage suffered by them prior to the commencement of the action, it is not to be presumed that the jury included in their verdict any damage by reason of delay in repairing the house, or any expense incurred by removal from the house after the action was commenced. (Id.)
16. EXTENT OF DAMAGES—SUPPORT OF VERDICT.—Where there was evidence tending to show that the amount of damages was greater than that awarded by the jury, and it was apparent that the permanent injury to the building, by displacing it from its foundations breaking its chimneys, and destroying its plastering, is a greater damage than the mere cost of patching it up so as to make it

NEGLECT (Continued).

serviceable, the verdict as to the amount of damages was sufficiently supported, notwithstanding evidence for the defendant that a portion of the damage could be repaired for less than the amount of the verdict. (Id.)

17. **MASTER AND SERVANT—SAFETY AND REPAIR OF APPLIANCES—LIABILITY OF EMPLOYER—QUALIFICATION OF RULE.**—The general rule requiring an employer to furnish appliances that are reasonably safe, and to use reasonable care to keep the same in repair, and that this duty cannot be delegated, does not apply to defects arising in the daily use of an appliance which are not of a permanent character and do not require the help of skillful mechanics to repair, but which may easily be, and usually are, repaired by the workmen, and to repair which suitable materials are supplied, unless such defects become actually known to the employer, or continue for so long a time or under such circumstances as to warrant the conclusion that in the exercise of reasonable care he should have known thereof. (*Helling v. Schindler*, 303.)
18. **SLIGHT DEFECTS ATTENDANT UPON OPERATION OF MACHINERY—DUTY OF MASTER NOT INVOLVED—NEGLECT OF FELLOW-SERVANT.**—Slight defects attendant upon the operation of machinery which, from their nature, require remedying at the hands of the operators themselves, and as a part of the proper operation of the machine, are not required to be amended by the master; and any negligence in the performance of that duty by a particular employee whose business it is to remedy such defects is the negligence of a fellow-servant. (Id.)
19. **DULLNESS OF KNIVES OF PLANER—LOOSENESS OF BELT—REMEDIES FOR OPERATION—EMPLOYER NOT LIABLE.**—The mere dullness of the knives of a planer, which may be sufficiently remedied by a file in the hands of an employee, and the mere looseness of a belt, which may be remedied by putting on a dressing with which an employee is supplied, are defects of such a nature that the employer cannot be held responsible therefor, in the absence of other circumstances. (Id.)
20. **EVIDENCE—REPAIRS AFTER ACCIDENT.**—Evidence simply to the effect that after the accident the knives were sharpened by the foreman before being again used, is not admissible for any purpose; and its admission is error, necessitating a reversal of a judgment for the plaintiff. (Id.)
21. **MASTER AND SERVANT—KNOWLEDGE OF DEFECTIVE APPLIANCES—ASSUMPTION OF RISK—NONSUIT—LAW OF CASE.**—In an action by a teamster for damages for negligence of the master in failing to furnish proper appliances, in which a nonsuit was granted, and in which a second appeal was taken, where the evidence is the same as was considered upon a formal appeal, upon which a judgment in favor of plaintiff was reversed upon the ground that plaintiff's evidence showed that he had, with the full knowledge of defects in

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the appliances, voluntarily continued to work therewith for several months prior to the accident, and assumed the risk of working therewith, the decision upon the former appeal is the law of the case. (*Lâmberg v. Glenwood Lumber Company*, 255.)

22. **DEFECTS ALLEGED—EMPLOYMENT AS TEAMSTER—ELEMENT OF NEGLIGENCE NOT WITHIN ISSUES.**—Where the plaintiff was employed as a teamster in hauling lumber, and the only defects complained of were that the lines furnished were too short and that there was no seat on the wagon, evidence of a new element of negligence not within the issues, in not having a brake on the wagon, of which the plaintiff had the same knowledge as of the other defects, cannot be considered as affecting the question of nonsuit or the law of the case. (*Id.*)
23. **EVIDENCE—CUSTOMARY APPLIANCES—IMMATERIAL RULING.**—The exclusion of evidence as to whether it was customary in the business of hauling lumber with four horses to have a wagon equipped as this wagon was, and with lines such as were here used, was material, if at all, only on the question of negligence, and, if competent, such exclusion could not prejudicially affect the plaintiff's rights, where it is determined that he assumed the risk of the appliances used. In such case it is immaterial whether or not there was in fact negligence on the part of the defendant. (*Id.*)
24. **EVIDENCE PROPERLY EXCLUDED—QUESTIONS ASKED PLAINTIFF.**—A question asked the plaintiff as to whether or not, if he had lines long enough to sit back on the load, he would have been pulled off by the lines, which went at most to the question of negligence and the cause of the accident, was properly excluded. It was also proper to exclude a question asked plaintiff as to what use he would have made of a brake if there had been one on the wagon. (*Id.*)
25. **NEGLIGENCE OF INDEPENDENT CONTRACTOR AND SUBCONTRACTOR—BUILDING CONTRACTOR NOT LIABLE.**—A building contractor is not liable for the negligence of another independent contractor, employed by the owner to do the plumbing and sewer work; nor is he liable for the negligence of an independent subcontractor employed by himself to do the plastering for the building for a specified sum, who agreed to furnish all the materials and labor required to complete the subcontract, and who had the entire charge of that part of the work and sole control of the workmen engaged therein. (*Green v. Seale*, 96.)
26. **QUESTION OF LAW—IMPROPER REFUSAL OF INSTRUCTIONS.**—Where the undisputed evidence showed that the plasterer was an independent contractor as to the building contractor defendant, and the subcontract did not require him to place his materials in any dangerous position, the meaning and effect of the contract and the relations of the parties to it were a question of law for the court; and it is error to refuse requested instructions that the subcontractor was an independent contractor as to the defendant, and that if the

NEGLIGENCE (Continued).

jury believed the injury complained of was the result of negligence on the part of the subcontractor, they must find for the defendant. (Id.)

27. **SUPERVISION OF ARCHITECT—RIGHT OF EMPLOYER TO MAKE ALTERATIONS.**—The fact that the work was to be done under the supervision of an architect, and that the employer had the right to make alterations, deviations, and omissions from the contract, does not change the relation of an independent contractor or subcontractor to that of a mere servant. (Id.)
28. **SUPPORT OF VERDICT—CONFLICTING EVIDENCE—DUTY OF TRIAL COURT.**—Where the evidence in support of the verdict, though not very satisfactory, is sufficient to raise a conflict, its sufficiency to support the verdict cannot be decided by this court; but it is the duty of the judge of the trial court to grant a new trial where the verdict is against the weight of the evidence, according to his independent judgment, notwithstanding a conflict therein. (Id.)

NEGOTIABLE INSTRUMENTS.

1. **ACTION UPON NOTE—DEFENSE—ACCOMMODATION OF MAKER FOR PAYEE—FAILURE OF PROOF—EVIDENCE—ACCOMMODATION FOR CORPORATION.**—In an action on a note which was taken up by the payee at a bank to which it was indorsed, and which was assigned by the bank to the plaintiff by the direction and for the use of the payee, a defense by the maker that he signed it for the accommodation of the payee wholly failed of proof, where the evidence showed that the maker, payee, and indorser of the note were stockholders in a corporation, and that the note was made and indorsed for the accommodation of the corporation, and was delivered to the corporation to be discounted for its use, and that the money was received and used by the corporation. (Kellogg v. Lopez, 497.)
2. **SURETYSHIP FOR CORPORATION—FORM OF INSTRUMENT DISREGARDED—CONTRIBUTION—RIGHTS AND OBLIGATIONS OF SURETIES INTER SE.**—Upon the facts of the case the form of the instrument may be disregarded, and the parties to the note are to be regarded as mere sureties for the corporation, and as such entitled to contribution from each other, and each surety in reference to the others, disregarding their common relation to the principal debtor, is primarily liable to them for his proportion of the debt, not as a surety, but as principal debtor, and his suretyship for the others applies only to the balance. (Id.)
3. **DEFENSE OF WANT OF CONSIDERATION—PROOF ONLY IN PART.**—The facts in the case, as to joint suretyship for the corporation, though differing materially from the facts pleaded under the defense of accommodation for the payee, were admissible under the defense of want of consideration, which was proved only in part as respects the suretyship of the defendant in his relations to the payee and

NEGOTIABLE INSTRUMENTS (Continued).

indorser as co-sureties, but failed in part as to his own primary liability for one third of the note to the indorsee of the bank for the use of the payee who took up the note. (Id.)

4. **ACTION UPON EXPRESS PROMISE OF MAKER OF NOTE—LEGAL CAUSE OF ACTION TO EXTENT OF CONSIDERATION.**—The suit brought is not for contribution merely, but is upon the express promise of the defendant, as maker, to pay the note, and there is a legal cause of action in such case to the extent to which there is a consideration for the note. (Id.)
5. **ACTION TO CANCEL NOTE — CONSIDERATION—FINDING—PRESUMPTIONS.**—In an action to cancel a promissory note for alleged want of consideration, the note must be presumed to have been executed for a sufficient consideration, and where the court found that there was a good and sufficient consideration therefor moving from the payee to the plaintiff, all presumptions are in favor of the finding of the court. (Rohrbacher v. Aitken, 485.)
6. **NOTE FOR SHORTAGE IN ESTATE OF DECEASED PERSON—DISMISSAL OF PROCEEDING AGAINST SURVIVING EXECUTOR.**—Where the note of the plaintiff, payable in six months, was executed to the defendant as assignee of a three-fourths interest in the estate of a deceased person, of which plaintiff's deceased husband and a surviving executor, were co-executors, in settlement of a shortage in the estate on the part of plaintiff's husband as executor, and in consideration of a dismissal of a proceeding legally instituted by the assignors of the payee, as heirs, to suspend the powers of the surviving executor, and to revoke his letters, such dismissal, after a full investigation of all the facts by plaintiff's attorney, was a sufficient consideration for the note. (Id.)
7. **COMPROMISE AGREEMENTS BY LITIGANTS FAVORED.**—Where a legal proceeding has been instituted, and the parties, after investigation, in the absence of fraud, make a compromise agreement, on account of which the proceedings are dismissed, the dismissal is a consideration for the agreement, which cannot afterwards be made to depend upon the question whether or not the party could have prevailed in the proceeding. Such agreements, in the absence of fraud, are favored and sustained by the courts, because they put an end to litigation and tend to produce peace and good-will. (Id.)
8. **DUTY OF PLAINTIFF TO PERFORM AGREEMENT—GOOD FAITH AND HONESTY.**—It appearing that plaintiff, having faith in her attorney, and wishing to save the reputation of her deceased husband, made the agreement and signed the note, under the circumstances of the case good faith and honesty require that plaintiff should keep the agreement she has made. (Id.)
9. **PRESENTATION OF CLAIM UNNECESSARY—PERSONAL OBLIGATION.**—It was not necessary for the defendants to have presented any claim against the estate of the deceased husband of the plaintiff

NEGOTIABLE INSTRUMENTS (Continued).

for his shortage as executor, the claim having been settled by the personal obligation of the plaintiff. If she desired the estate of her deceased husband to be alone responsible, she should have taken that position before she signed the note. (Id.)

NEW TRIAL.

1. NOTICE OF INTENTION—SIGNATURE BY ATTORNEY NOT SUBSTITUTED—WAIVER OF OBJECTION.—The fact that the notice of intention to move for a new trial was not signed by a former attorney of record for the defendant who failed to conduct the trial, and was signed by an attorney not regularly substituted, is immaterial where objection on that ground was waived by the plaintiff by recognising and treating such attorney as representing the defendant on the motion for new trial, and serving papers upon him as such. (Smith v. Smith, 615.)
2. ORDER GRANTING NEW TRIAL—INSUFFICIENCY OF EVIDENCE—SUPPORT OF GENERAL ORDER.—Where the motion for a new trial was upon all of the statutory grounds, a general order granting a new trial which can be supported on the ground of the insufficiency of the evidence to sustain the verdict will not be disturbed upon appeal. (Cooper v. Spring Valley Water Works, 207.)
3. VERDICT AGAINST WEIGHT OF EVIDENCE—CONFLICT—DISCRETION OF JUDGE—REVIEW UPON APPEAL.—The judge of the trial court has discretion to grant a new trial on the ground that the verdict is against the weight of the evidence, notwithstanding a conflict therein, and its order granting the same will not be disturbed where no abuse of discretion appears. (Id.)
4. ACTION FOR CONVERSION OF STOCK—INDORSEMENT—CONSIDERATION—PLEDGE—NEW TRIAL PROPERLY GRANTED.—In an action by an executor against the corporation defendant for conversion of stock belonging to the testator, where the evidence showed that it was regularly indorsed in his handwriting, and was transferred by the holder to a bank as security for money borrowed, and the verdict was for the plaintiff on the ground that the shares were wrongfully taken by the holder, who directly testified that the stock was indorsed and delivered to him by the testator in payment for professional services, the court properly granted a new trial, notwithstanding conflicting evidence that such services were gratuitously given. (Id.)
5. IMPROPER ADMISSION OF NEGATIVE TESTIMONY.—In such action the court improperly admitted testimony that the deceased had never told certain witnesses that he had transferred the stock, and that the physician never told the witnesses that the stock had been transferred to him. They were not called upon to speak thereof to third persons. (Id.)
6. IRREGULARITY IN PROCEEDINGS OF COURT—MISCONDUCT OF JUDGE—AFFIDAVITS.—Personal misconduct on the part of the judge having

NEW TRIAL (Continued).

under advisement a case tried in his court of such a nature that the substantial rights of the party against whom the case is decided have been materially affected thereby, constitutes an "irregularity in the proceedings of the court," for which a new trial may be granted, under subdivision 1 of section 657 of the Code of Civil Procedure, if established by competent affidavits. (*Gay v. Terrance*, 144.)

7. **RIGHTS OF MOVING PARTY AS TO AFFIDAVITS—REPLY TO COUNTER-AFFIDAVITS—CONSIDERATION BY COURT.**—The party moving for a new trial on the ground of "irregularity in the proceedings of the court which prevented a fair trial," is entitled to file and serve not only competent original affidavits tending to establish the same, but also reply affidavits to new matter in counter-affidavits, and is of course entitled to have all competent affidavits considered by the court upon the hearing on the motion. (*Id.*)
8. **IMPROPER ORDER STRIKING OUT AFFIDAVITS—APPEAL—BILL OF EXCEPTIONS—ACTION OF COURT.**—The trial court is not justified in striking out any competent affidavits filed and served upon the motion. An order purporting to do so after final judgment is appealable; and the appellant is entitled to a bill of exceptions embodying any competent counter-affidavits stricken out. (*Id.*)
9. **MANDAMUS—SETTLEMENT OF EXCEPTIONS—DISCRETION.**—The granting of the writ of *mandamus* is not a matter of right, but a matter largely within the discretion of the court. The writ will not issue where it would be of no benefit to the applicant, or if he does not establish his right to the relief sought. But the discretion of the court to grant or refuse the writ is not arbitrary, but is to be exercised in accordance with the established rules of law, in order to prevent a failure of justice. It would be an abuse of discretion to refuse the writ to one who has a substantial right to protect or enforce which may be accomplished thereby, and for which there is no other plain, speedy, or adequate remedy in the ordinary course of law. (*Id.*)
10. **AFFIDAVITS UPON INFORMATION AND BELIEF PROPERLY STRICKEN OUT—DEMAND TOO BROAD—REFUSAL OF MANDATE.**—An affidavit filed by an attorney for the moving party, assailing the judge for misconduct solely upon information and belief, is unavailing for any purpose, and it was properly stricken out as scandalous. Where the demand which was the basis of the petition for the writ of mandate was, that such affidavit be included with others in the bill of exceptions, it was too broad; and the alternative writ of mandate, having been awarded for a purpose partly proper and partly improper, will be discharged, and a peremptory writ will be refused on that ground. (*Id.*)

See Appeal, 1-3; Criminal Law, 24; Divorce, 4, 5; Mechanics' Liens, 1, 2.

NOTICE. See Bona Fide Purchaser, 1.

NUISANCE.

1. **DAM CAUSING INJURY TO LAND—DESTRUCTION OF ORANGE-TREES—MANDATORY INJUNCTION.**—A dam erected by the defendant which caused the waters of a stream to flow out of their natural channel, and to flow over the plaintiff's land, causing irreparable injury thereto by the excavation of deep gulches therein, and the destruction of orange-trees growing thereon, is a nuisance *per se*, which may be abated by a mandatory injunction compelling the defendants to remove so much of the dam as caused the injury. (*Allen v. Stowell*, 666.)
2. **USE OF MANDATORY INJUNCTION.**—A trespass irreparable in its character and of a continuing nature, or a nuisance, may be restrained by a mandatory injunction, thus restoring things to their original condition. The right to a mandatory injunction does not depend upon the settlement of the rights of the parties at law, nor, if there be a legal injury caused by a nuisance, upon the extent of the damage caused thereby measured by a money standard. The principles upon which mandatory and prohibitory injunctions are granted do not materially differ. The courts are perhaps more reluctant to interpose the mandatory writ, but in a proper case it is never denied. (*Id.*)
3. **LOCATION OF RAILROAD CULVERTS—MISTAKE OF RAILROAD COMPANY—DEFENDANTS NOT JUSTIFIED.**—The defendants had no right to build the obstruction to plaintiff's injury for the purpose of correcting a mistake of a railroad company in locating its culverts. Whatever was the effect on plaintiff's land from the defective condition of the railroad, or the location of its culverts, defendants cannot justify or defend their acts on the ground that they were endeavoring to obviate the mistakes of the railroad company and failed, it appearing that their dam was the cause of the injury to plaintiff's land. (*Id.*)

OFFICE AND OFFICERS.

1. **COUNTY GOVERNMENT ACT—OFFICE OF DISTRICT ATTORNEY—SERVICES OF STENOGRAPHER NOT A CLAIM AGAINST COUNTY.**—The County Government Act of 1897, defining the duties and fixing the compensation of district attorneys, and making it in full for all services of every kind, and of every deputy and assistant not otherwise provided for in the act, makes the district attorney responsible for the services of a stenographer employed by him to write letters, pleadings, and judgments, and such services cannot be allowed as a legal claim against the county. The traveling and other expenses to the district attorney under section 228 of the County Government Act do not include such service of a stenographer. (*Hamiston v. Shaffer*, 195.)

OFFICE AND OFFICERS (Continued).

2. **ACCUSATION OF OFFICER FOR MISCONDUCT—PURPOSE OF PROCEEDING—EFFECT OF JUDGMENT.**—An accusation made by a grand jury under section 758 et seq. of the Penal Code, charging an officer with misconduct in his office, has for its main purpose the removal of the accused from his office. The judgment can go no farther than such removal; and if it involves a criminal offense, the judgment is no bar to a criminal prosecution for such offense. (*People v. Burleigh*, 35.)
3. **ACCUSATION NOT AN INDICTMENT—ORDER SUSTAINING DEMURRER—APPEAL BY PEOPLE—DISMISSAL.**—The accusation is not an indictment, nor is it to be treated as such. The trial under the accusation is not subject to the rules applying to the trial of an indictment. The people have no right of appeal from an order sustaining a demurrer to the accusation, and its appeal therefrom must be dismissed. (*Id.*)
4. **OFFICE OF TAX-COLLECTOR—FORCEIBLE POSSESSION—OFFICER DE FACTO—INJUNCTION—TITLE NOT INVOLVED.**—Where an ineligible person elected to the office of tax-collector, and having the certificate of election, took forcible possession thereof from the incumbent holding over, who believed in good faith that he had the right to retain possession, and resisted such forcible possession, and the court found that the intruder was in possession of the office and was *de facto* tax-collector, when an action was commenced by him to enjoin the incumbent from interfering with him in the performance of his duties, the title to the office was not involved in such suit, and cannot be inquired into, and the defendant by resisting the intrusion and obeying the injunction has lost none of his legal rights. (*Scott v. Sheehan*, 691.)
5. **FINDING SUPPORTED BY EVIDENCE.**—Where it cannot be said that there was not sufficient evidence before the court to justify its finding that the plaintiff had entered upon the duties of his office, it was proper to enjoin the defendant from interfering with the plaintiff. (*Id.*)
6. **ELECTIONS—TAX-COLLECTOR—QUALIFICATIONS FOR OFFICE—RESIDENCE FOR FIVE YEARS BEFORE ELECTION—SAN FRANCISCO CHARTER.**—Under the charter of San Francisco the tax-collector must be an elector of the city and county at the time of his election, and for five years previous thereto; and if he has not those qualifications at the time of his election he is not capable of being elected to that office, and will not be entitled to hold the office, even though he has received a majority of the votes cast at the election. It is of no avail that he has the requisite qualifications at the time of taking office. (*Sheehan v. Scott*, 684.)
7. **CONSTITUTIONAL LAW—LEGISLATURE POWER—QUALIFICATIONS FOR OFFICE.**—The constitution of the state is not a grant of power, and the legislative power which is vested in the senate and as-

OFFICE AND OFFICERS (Continued).

sembly includes all power not expressly prohibited to the legislature or elsewhere conferred. Though the legislature cannot increase or diminish the qualifications which the constitution has prescribed for eligibility to the offices created by that instrument, nevertheless, for all offices which the legislature may authorize or establish, it may prescribe such qualifications as in his judgment will best accord with public policy or subserve the interests of those affected thereby. (Id.)

8. **QUALIFICATIONS IN MUNICIPAL CHARTER—LEGISLATIVE AUTHORITY OF STATE.**—The authority to provide a municipal government is referable to the lawmaking power of the state, and the enactment of a charter for a municipality is a legislative act, and the authority withdrawn from the legislature and given to the city is part of the lawmaking power of the state. The adoption of the charter by the city, and its approval by the legislature, have the same effect as that of a law passed by bill. The provisions of the San Francisco charter in reference to the qualifications for eligibility to the office of tax-collector have been established by the legislative authority of the state, and are valid. (Id.)
9. **FINDING AGAINST QUALIFICATIONS—RESIDENCE FOR FIVE YEARS—SUFFICIENCY OF EVIDENCE—PROBATIVE FACTS.**—A finding of the court that the appellant had not been a resident elector of the city of San Francisco for the period of five years next preceeding the date of the election is sufficiently sustained, and must be accepted as correct, in so far as the determination of the court upon the probative facts upon which the ultimate fact depends was made upon conflicting evidence or by reason of inferences from established facts. (Id.)
10. **CHANGE OF DOMICILE—BURDEN OF PROOF—DECLARATIONS OF INTENTION—UNION OF ACT AND INTENT REQUIRED.**—The burden of proof was upon the appellant, who had acquired a domicile in another county, to prove a change of domicile; and evidence of mere declarations of future intention will not affect the residence until the intention is carried into effect by the completed act. The residence can be changed only by the union of act and intent. (Id.)
11. **DEAF, DUMB, AND BLIND ASYLUM—POWERS OF BOARD—REMOVAL OF PHYSICIAN.**—The board of directors of the deaf, dumb, and blind asylum having elected a physician, who, under subdivision 4 of section 2255 of the Political Code, is to be elected for the term of two years, have no power to remove him during the term prescribed. The power given by subdivision 5 of that section, "to remove, at pleasure, any teacher or employee," is to be construed as referring only to employees or officers of a like kind or class with the teachers who hold without fixed term, and not as including the physician, whose term of office is fixed, and whose removal is provided for only by section 772 of the Penal Code. (Wall v. Board of Directors of Deaf, Dumb, and Blind Asylum, 468.)

OFFICE AND OFFICERS (Continued).

12. **BY-LAWS OF BOARD—POWER OF REMOVAL.**—The board having no power under the statute to remove its physician during the term for which he was elected, could not confer such power upon itself by its by-laws. (Id.)
13. **TIME OF ELECTION—REPEAL OF BY-LAWS—PRESUMPTION OF REGULARITY.**—The fact that the time of the election of the physician did not occur on the day prescribed in the by-laws is immaterial where it appears that the by-laws had been previously repealed under proceedings for repeal which must be presumed to have been regular. (Id.)
14. **RETROSPECTIVE ELECTION.**—Assuming that the board had no power to elect the physician retrospectively for the period which had elapsed at the time of election, the result would be merely that his term of two years would either commence at the date of the election or would be proportionately shortened; whether it would be one or the other it is deemed unnecessary to determine. (Id.)
15. **COMPENSATION OF PHYSICIAN.**—The term "employees" used in subdivision 6 of section 2255 of the Political Code, giving power to the board "to fix the compensation of teachers and employees," may be deemed used in a larger sense so as to include the compensation of the physician. The same words may have different constructions to effectuate the intention of the act. Nor is it clear that in the absence of statutory provision the power to elect an officer does not carry with it the power to provide for the compensation of the officer. (Id.)
16. **CHARTER OF OAKLAND—COMPENSATION OF "AUDITOR AND ASSESSOR"—SINGLE OFFICE—COMMISSIONS ON TAXES—LIABILITY ON OFFICIAL BOND.**—Under the charter of the city of Oakland, the office of "auditor and assessor" is one single office, and the incumbent thereof is only entitled to the salary fixed for that office, and he is liable on his official bond for commissions retained on taxes collected and not paid into the treasury. (City of Oakland v. Snow, 419.)
17. **DESCRIPTION OF OFFICE IN BOND—"EX OFFICIO ASSESSOR"—OBLIGATION NOT AFFECTED.**—Though the charter describes the office as that of "auditor and assessor," and fixes the salary of the incumbent as such, yet where it also provides that "the auditor shall be *ex officio* assessor," and that there shall be elected "an auditor, who shall be *ex officio* assessor," and the incumbent was elected as auditor and *ex officio* assessor," and the official bond was required by the city council by the latter description, the description so adopted in the bond is harmless, and does not affect the validity of the obligation, which is the same in legal effect as if the officer styled therein were "auditor and assessor," instead of "auditor and *ex officio* assessor." (Id.)
18. **DUTIES OF OFFICER—CONSTRUCTION OF BOND.**—The provisions of the charter respecting the duties required of the officer are read into

OFFICE AND OFFICERS (Continued).

the bond, and are to be construed in connection with it. There is no infringement of the strict rights of the sureties, by construing the meaning of the terms employed in the bond in accordance with recognized rules for the interpretation of contracts. (Id.)

19. **ADOPTION OF LAWS RESPECTING REVENUE AND TAXATION—COMPENSATION NOT AFFECTED.**—The adoption in the Oakland charter of the laws of the state applicable to the assessment, equalization, levy, and collection of taxes, and making the powers and duties of the city assessor the same as those of the county assessor, did not include any provisions of law respecting compensation for the collection of taxes, nor affect the compensation of the "auditor and assessor" as fixed by the charter. (Id.)
20. **ACTION ON BOND—FINDINGS—QUESTION OF LAW.**—In the action on the bond the findings are to be construed so as to sustain the judgment. A finding that the defendant collected the money "as assessor" or "as *ex officio* assessor" is of the same legal import; and a finding that he "failed to perform the official duties of such office as *ex officio* assessor" is equivalent to a finding that he failed to perform that portion of the duties of the office to which he was elected and for which the bond was given. It was a question of law whether he was entitled to compensation for the collection of taxes, and an answer that he was so entitled did not raise an issue on which a special finding was required. (Id.)
21. **EVIDENCE PROPERLY EXCLUDED—CONSENT OF CITY—NOTORIETY OF CLAIM.**—Evidence was properly excluded to show that the commissions on taxes collected were retained by defendant with the consent of the city, or that he declared prior to his election that he intended to claim the commissions, or that several city officials had approved of his act or consented thereto, and that it was a matter of public notoriety. The city could not consent to a violation of its charter or be estopped from claiming the money by the erroneous interpretation of its charter by its officials. (Id.)
22. **SUFFICIENCY OF EVIDENCE—AMOUNT RETAINED—CONVERSION.**—Where the amount collected was shown, and the amount paid into the treasury during the term of office was shown, and there was no averment or evidence that any further amount had been paid, findings that plaintiff had failed to pay into the treasury the amount of the excess for which judgment was given, and that he appropriated the excess to his own use, were sufficiently sustained. (Id.)
23. **EXECUTION AND DELIVERY OF BOND—LOSS OF ORIGINAL—EVIDENCE—PRESUMPTION—SUPPORT OF FINDING.**—Where the original bond was lost, and a copy was set out in the complaint and introduced in evidence, and the answer substantially admitted the execution of the original, and it was proved to have been delivered to the mayor, and by him to the city clerk, and was copied by the clerk into the register of official bonds, this, in connection with the presumption that official duty was regularly performed, is sufficient

OFFICE AND OFFICERS (Continued).

to support a finding that the original bond was executed and delivered to the city. (Id.)

- 24. APPROVAL OF BOND NOT REQUIRED.**—The original bond was a valid obligation of the principal and surety, without any approval by the mayor or city attorney. (Id.)

See *Estates of Deceased Persons*, 24.

PARENT AND CHILD.

- 1. DIVORCE—CUSTODY OF CHILD AWARDED TO MOTHER—NECESSARY SERVICES TO CHILD—DIVORCED FATHER NOT LIABLE.**—Where, by a decree of divorce, the custody of an infant child of the parties was awarded to the mother, who by contract with the father agreed to maintain the child in consideration of certain payments, the father, who has not contracted for necessary surgical services rendered to the child, is not liable therefor to a surgeon who knew of the decree and of the award of the custody of the child to the mother. (*Selfridge v. Paxon*, 713.)
- 2. CONSTRUCTION OF CIVIL CODE—LIABILITY LIMITED TO CUSTODY OF CHILD.**—Under sections 196 and 207 of the Civil Code the duty of a parent to support a child, and the liability of the parent for necessities furnished to the child by a third person, are confined to a parent entitled to the custody of the child and having it under his charge, and no such liability attaches to a parent who has been deprived of such custody and charge. (Id.)

PARTITION.

PLEADING—SUFFICIENCY OF DESCRIPTION—FRIVOLOUS APPEAL—DAMAGES.—Where the description of the property in a complaint in partition is sufficient under the rule in all jurisdictions, and long settled in this state, upon appeal from an interlocutory judgment involving only a demurrer for uncertainty in the description the judgment will be affirmed with damages for a frivolous appeal. (*Home Security Building and Loan Association of Alameda County v. Western Land and Title Company*, 217.)

See *Trusts*, 1-3.

PLACE OF TRIAL.

- 1. ORDER CHANGING VENUE—RESIDENCE OF DEFENDANTS—CONVENIENCE OF WITNESSES—PRESUMPTIONS UPON APPEAL—DISCRETION.**—All presumptions upon appeal are in favor of an order changing the place of trial. Where the motion was made on the ground that all the defendants save one were residents of the county to which the venue was changed, and that he was not a proper or necessary party to the action, and also on the ground that the convenience of witnesses and the ends of justice would be promoted by the change, supported by affidavits, if it be conceded that such defendant was a proper and necessary party, the order may be supported on the

PLACE OF TRIAL (Continued).

second ground stated in the motion, and it will not be disturbed upon appeal where no abuse of discretion appears. (*Grant v. Barnister*, 219.)

2. **ACTION TO QUIET TITLE TO STOCK OF CORPORATION—PLACE OF TRANSACTION—RESIDENCE OF WITNESSES—GENERAL AFFIDAVITS IN SUPPORT OF ORDER.**—Where the action was brought to quiet title to stock in the corporation defendant having its place of business in the county to which the venue was changed, and the transactions involved in the cause of action and defense took place in that county, and the plaintiff's grantor and all defendants owning stock reside therein, and plaintiff has business relations therein, although both the affidavits for defendants and the counter-affidavits of plaintiff as to the convenience of witnesses were too general, in merely stating their residence without giving their names and the testimony expected from each, and little importance would be attached to defendant's affidavit had the motion been denied, yet where it was granted, taking their affidavits in connection with the pleadings and papers on file, and the same general character of the counter-affidavits, it cannot be said that there was not sufficient basis for the order. (*Id.*)
3. **STIPULATION FOR TIME TO PLEAD—MOTION FOR CHANGE OF VENUE.**—A stipulation giving to the defendant further time to plead carries with it the right to move for a change of venue at the time of pleading under the statute, notwithstanding the allowing of "additional time to make a motion in said action" was stricken from the stipulation. (*Id.*)

PLEADING.

1. **SECOND AMENDED COMPLAINT—ERRORS IN RULING UPON FORMER COMPLAINTS.**—Where issues were joined and a trial had upon a second amended complaint the former complaints were superseded, and any errors in rulings made upon the former complaints are immaterial. (*Rooney v. Gray*, 753.)
2. **SUFFICIENCY OF AMENDED COMPLAINT—INJUNCTION—DAMAGES—DEMURRER—MISJOINDER OF CAUSES.**—Where the second amended complaint sought an injunction to restrain injuries to plaintiff's premises from blasting operations of the defendant, and for damages for injuries sustained thereby, and in aid of the injunction not only alleged the throwing of large rocks upon his premises, but also set forth injuries to sewers, causing sewer gas to arise on the premises, and clouds of fine dust, affecting the health of plaintiff and his family, and injuring their carpets, curtains, and furniture, a demurrer for misjoinder of causes of action was properly overruled. (*Id.*)
3. **IMPROPER ASSUMPTIONS IN DEMURRER.**—Grounds of demurrer assuming that the complaint was solely one for damages were properly overruled. (*Id.*)

PLEADING (Continued).

4. **UNCERTAINTY AS TO DAMAGES—SPECIFIC DENIALS OF COMPLAINT—TRIAL.**—Though the amended complaint was to some extent uncertain as to the exact amount of the damages sustained by plaintiff for the particular injuries complained of, yet where the answer specifically denied all the allegations of the complaint and a trial was had upon the issues thus joined, the defendants were not prejudiced by the refusal of the court to sustain a demurrer for such uncertainty. (Id.)
5. **ACTION FOR MINING MACHINERY AND WORK—ISSUES—COUNTERCLAIM—CONFLICTING EVIDENCE—PROBABILITIES—SUPPORT OF FINDINGS.**—In an action to recover a balance of account for mining machinery alleged to have been sold and delivered to the defendant, and for work in installing the same upon a mining claim owned by a corporation in which plaintiff was a stockholder, where issue was joined upon the complaint, and the defendant by answer and cross-complaint pleaded a counterclaim for money paid to plaintiff's use, and the evidence was squarely conflicting between the parties, without other witnesses, and the probabilities were in favor of the defendant, findings against the plaintiff, and in favor of the counterclaim of the defendant, were sufficiently supported and will not be disturbed upon appeal. (Abner Doble Company v. McDonald, 641.)
6. **CROSS-COMPLAINT—FAILURE TO ALLEGE NON-PAYMENT OF COUNTERCLAIM—CURE OF DEFECT.**—The failure of the cross-complaint to allege non-payment of the counterclaim pleaded therein was cured by answer thereto denying the original indebtedness, by failure to object to evidence thereof for such failure, and by findings in support of the counterclaim. (Id.)
7. **RIGHT TO FILE CROSS-COMPLAINT—NEW PARTIES—POWER OF COURT.**—The right to file a cross-complaint under section 442 of the Code of Civil Procedure is limited to cases in which the defendant seeks affirmative relief against a party to the action. New parties can only be made by an order of the court; but the court has no power under section 389 of that code to bring into the action for determination a controversy between the defendant and strangers to the action which is irrelevant to the action as between the parties before it. The persons brought in must be persons whose presence is essential to the determination of the controversy before the court. (Alpers v. Bliss, 565.)
8. **PARTITION—EX PARTE ORDER OF JUDGE ALLOWING CROSS-COMPLAINT—CONTROVERSY WITH THIRD PARTIES—ORDER VACATING AND STRIKING OUT—DISCRETION.**—Where a defendant at the time of filing his answer in an action for partition obtained an *ex parte* order from the judge out of court permitting a supplemental cross-complaint to be filed, in which he set up a title acquired nine years after the commencement of the action, and alleged that plaintiffs pending suit had transferred their title to a third person, and, without order of court, made such third person a party defendant, with whom a

PLEADING (Continued).

controversy was sought, and the relief against the plaintiffs was limited to a money judgment for rents and profits, the court exercised proper discretion under section 937 of the Code of Civil Procedure to vacate such *ex parte* order, and to strike the cross-complaint from the files. (Id.)

9. **RIGHT OF DISMISSAL OF ACTION.**—The right of the plaintiffs to have the action dismissed and the authority of the clerk to enter the judgment of dismissal depend upon the condition of the pleadings at the time of the request for dismissal, and where a cross-complaint was properly stricken from the files the plaintiffs' right to dismiss the action was absolute. (Id.)
10. **CHARACTER OF LAND SUED FOR—NEGATIVE ALLEGATION—DENIAL—BURDEN OF PROOF.**—Where the action was for the recovery of a lot of land situated on Lake Merritt, in the city of Oakland, comprising one acre and one twelfth, with dwelling-house and other improvements thereon, a negative allegation that it was not agricultural land, denied by the answer, need not be proved by the plaintiff; but the burden is upon the defendant to show that it was agricultural land within the meaning of the code. (Holmes v. Warren, 457.)
11. **ACTION FOR VALUE OF SERVICES—MUTUAL ACCOUNT—BALANCE DUE—PLEADING—ANSWER—GENERAL DENIAL—ACCOUNT STATED—FINDINGS WITHIN ISSUES.**—In an action by the assignee of an attorney to recover the reasonable value of his services, in the amount of an alleged balance due upon a mutual, open, and current account, setting up the items claimed by the defendant in an unverified complaint, where the answer denied that defendant is indebted to plaintiff in the balance alleged, or in any sum, and pleaded an indebtedness of plaintiff's assignor to the defendant in a certain sum over and above all credits and offsets prior to the assignment, and that while the attorney was so indebted to defendant an account was stated between them in favor of the defendant in a specified sum,—findings that the account was mutual, open, and current, that services of a value greater than the balance claimed were rendered by the attorney under a special agreement for payment out of a particular fund, after making a deduction which would exhaust the fund, and that there was no balance due from defendant to the attorney or to plaintiff, are within the issues raised by the answer. (Heaton-Hobson Associated Law Offices v. Arper, 282.)
12. **SUFFICIENCY OF ANSWER.**—Under the general issue in *assumpsit*, anything which shows that plaintiff at the time of the commencement of his action had no cause of action may be taken advantage of; and any allegation in an answer which, if found true, necessarily shows that the allegation of the complaint as to the same matter is untrue, is a good traverse and sufficient as a denial. (Id.)

PLEADING (Continued).

13. **AMBIGUITY AND UNCERTAINTY—GENERAL DEMURRER.**—Ambiguity and uncertainty in a pleading are not available upon general demurrer, and can only be taken advantage of by special demurrer. (Williams, Belser & Co. v. Rowell, 259.)
14. **STATUTE OF LIMITATIONS—AMENDMENT OF COMPLAINT—CAUSE OF ACTION NOT CHANGED—IMMATERIAL VARIANCE.**—Where an amendment to the complaint does not change the cause of action, but refers solely to the cause of action originally alleged and facts existing at the time of its accrual, and merely omits certain matters which do not show a material variance, the statute of limitations has reference only to the original complaint, and does not extend to the time of filing the amendment. (Frey v. Vignier, 251.)
15. **AMENDED ANSWER—CURE OF ERROR.**—An error in the refusal of the court to file an amended answer after an immaterial amendment to the complaint allowing a special traverse of each of the material allegations of the original complaint was cured by subsequently allowing an amended answer after all the amendments to the complaint were filed, in which he substantially denied all the allegations of the whole complaint as amended. (Id.)
16. **SUPPORT OF FINDINGS.**—*Held*, that the evidence fully warrants the findings of the court for the plaintiffs. (Id.)

See Appeal, 13, 14; Assault and Battery, 1, 3, 5; Assignment, 1; Bona Fide Purchaser, 2; Contract, 11; Ejectment, 1; Fraud, 1, 2; Husband and Wife, 12, 13; Injunction, 2; Judgment, 4; Mortgage, 11-13; Partition; Quieting Title, 1.

POLICE COURT.

1. **PRELIMINARY EXAMINATION BY POLICE JUDGE—SOURCE OF POWER—SAN FRANCISCO CHARTER—PENAL CODE.**—The charter of the city and county of San Francisco only confers upon the police court, as such, the power to conduct preliminary examinations in cases of felony, and no such power could be conferred upon the police judge by the charter, under the grant of power by the constitution to create police courts. Nevertheless, the police court having been established, a judge thereof has power to hold a preliminary examination as a committing magistrate under the general provisions of section 808 of the Penal Code. (Elder v. McDougald, 740.)
2. **POWER TO APPOINT STENOGRAPHIC REPORTER—CONSTITUTIONAL LAW—PROVISIONS OF CHARTER—CODE PROVISIONS SUPERSEDED.**—Under section 8½ of article XI of the constitution, placing police courts under charter control, and authorizing the charter to fix the compensation of attachés, the power given by the charter of the city and county of San Francisco to the police judges to appoint not more than two stenographic reporters, and fixing their compensation and duties, including the taking of notes of all preliminary examinations, is exclusive, and supersedes the provisions of section 869 of

POLICE COURT (Continued).

the Penal Code, so that a police judge acting as a committing magistrate has no power under that section to appoint another stenographic reporter, and to fix his compensation as a charge upon the municipal treasury. (Id.)

3. **"ATTACHES OF POLICE COURT—STENOGRAPHERS.**—The stenographers appointed by the police judges under the charter are "attachés" of the police court within the meaning of section 8½ of article XI of the constitution. (Id.)

See Certiorari.

PRACTICE.

MOTION FOR NONSUIT—SUFFICIENCY OF EVIDENCE—SUFFICIENCY OF COMPLAINT NOT INVOLVED.—Upon motion for a nonsuit, the only question to be considered is as to the sufficiency of the evidence to sustain the complaint; and where the court was warranted by the evidence in refusing the motion, the question whether there was no sufficient complaint to which any evidence offered by the plaintiff could be applied is not involved. (Holmes v. Warren, 457.)

See Appeal; Bill of Exceptions; Costs; Findings; Judgment; New Trial; Place of Trial; Summons.

PROHIBITION. See Trusts, 8.

PUBLIC OFFICERS. See Office and Officers.

QUIETING TITLE.

1. **ACTION TO QUIET TITLE—SUFFICIENCY OF COMPLAINT—JUDGMENT UPON DEMURRER—CASE AFFIRMED.**—The complaints involved upon each of the present appeals being substantially the same and involving the same question as the complaint which was held sufficient to warrant reversal of a judgment upon demurrer in the case of *Alcorn v. Buschke*, 183 Cal. 655, that case is affirmed and applied in reversal of the judgments upon demurrer here involved. (*Alcorn v. Brandeman*, 62.)
2. **VOID DECREE OF PARTIAL DISTRIBUTION—PETITION BY ADMINISTRATOR—QUESTION AS TO ESTOPPEL NOT PRESENTED UPON DEMURRER.**—Where the complaints set forth a decree of partial distribution upon petition of the administrator, which is void, and which was set up solely as one of the sources of the defendants' claim of title alleged to be without right, and alleged that the plaintiffs neither authorized or were cognizant of them, and never consented, agreed to, or approved thereof, and does not allege that plaintiffs took under the decree, the question whether they were estopped by taking thereunder from questioning its validity is not presented upon the demurrer, and can only be raised by appropriate pleading and proof. (Id.)

QUIETING TITLE (Continued).

3. **TITLE OF ADMINISTRATOR AS HEIR—QUESTION INVOLVED NOT GOING TO SUFFICIENCY OF COMPLAINTS.**—Where the plaintiffs derive title to two thirds of the property from other heirs, and as to one third thereof by conveyance from the administrator as an heir, questions which may arise as to the effect of the decree of partial distribution had at the administrator's request, upon his own interest, and as to whether the petition and decree did not operate as a ratification of a deed under the power of attorney involved in the cases, do not affect the sufficiency of the complaints as to the other two thirds of the property, and the demurrers thereto were improperly sustained. (Id.)

See Boundary; Estoppel, 1; Water and Water-Rights, 1-7.

RAILROADS.

1. **LIMITED TICKET—RETURN TRIP—BREACH OF CONTRACT—EXPIRATION OF TICKET—EXPULSION OF PASSENGER.**—Where the holder of a limited round-trip railroad ticket was prevented from making the return trip within the time limited, owing to a railroad strike, but did not attempt to use the return ticket immediately after the strike was ended, nor within an extension of time granted for six days thereafter, but made his return trip by other means, his only remedy was for damages for breach of the contract, and he could not use the return ticket after the expiration of the time limited by the ticket and by the extension granted; and where he presented no other ticket, and refused to pay his fare, he was properly expelled from the train. (Elliott v. Southern Pacific Company, 441.)
2. **RETENTION OF LIMITED TICKET BY CONDUCTOR.**—The fact that the conductor improperly retained the limited ticket after it had become void, and refused to return it to the plaintiff upon his demand for such return, could not give the plaintiff any right to remain on the train without the presentation of a valid ticket or the payment of fare, and without any offer to pay fare in the event of the return of the ticket. [Beatty, C. J., dissenting for reasons expressed.] (Id.)
3. **STATEMENT BY ANOTHER TICKET AGENT AFTER SALE OF LIMITED TICKET—WAIVER NOT SHOWN.**—A mere statement by another ticket agent, who did not sell the ticket, made at the return point ten days after its sale, that the ticket would be good when the trains start, could not operate as a waiver of the stipulation as to time in the absence of proof of his authority to make such waiver, even if the language used could be construed as a waiver. (Id.)
4. **UNSUPPORTED FINDINGS.**—Held, that findings that the time of use of the return ticket was reasonable, and was the first opportunity for its use, and that plaintiff would not have purchased the ticket had he known of the strike, and that in selling the ticket the railroad company committed a fraud upon the plaintiff, and that plain-

RAILROADS (Continued).

tiff's consent to the contract was induced by fraudulent concealment, are unsupported by the evidence. (Id.)

5. **RIGHTS OF PARTIES TO LIMITED TICKET—INABILITY OF PERFORMANCE—COMPLETION OF JOURNEY—FIRST OPPORTUNITY.**—The rights of the parties to a limited ticket are ordinarily limited by the terms of the contract; but in case of inability on the part of the railroad company rendering the strict performance of the contract unreasonable, the passenger, if he avails himself of the first opportunity to complete his journey, may so complete it under the contract, although the time limited has expired. (Id.)
6. **FIRST OCCASION OF USE NO CRITERION OF FIRST OPPORTUNITY.**—The fact that the plaintiff did not have occasion to use the return ticket for one month after train service was resumed is no criterion as to what was a reasonable time or the first opportunity. (Id.)

RECEIVERS.

1. **ACTION BY STATE—DISSOLUTION OF CORPORATION—VOID ORDER FOR RECEIVER—ALLOWANCE OF ATTORNEYS' FEES AGAINST STATE—REJECTION BY BOARD OF EXAMINERS—MANDAMUS.**—Where an action was brought by the state to dissolve a corporation, and the court therein made a void order appointing a receiver, and upon report of the receiver made an order allowing his attorneys compensation against the state, without notice to the state, and a claim therefor was repeatedly presented by the attorney to the state board of examiners, and repeatedly rejected by it, its action in rejecting it was discretionary and judicial, and *mandamus* will not lie to compel the board to allow it. (Sullivan v. Gage, 759.)
2. **ATTORNEYS' FEES NOT COSTS.**—The attorneys' fees allowed by the court are not costs against the state within the meaning of section 1038 of the Code of Civil Procedure, which the board has no discretion to reject, when the judgment therefor is final. (Id.)
3. **VOID ORDER OF ALLOWANCE.**—The allowance of attorneys' fees being based on the void order appointing the receiver, he cannot be regarded as a receiver, and the court had no power to allow attorneys' fees based upon such void order, and the order allowing the same is itself void. The order should have run to the receiver, and not to the attorneys for the receiver as such, who can have no right of action to enforce them, and the allowance to them is void. (Id.)
4. **JURISDICTION OF BOARD OF EXAMINERS.**—The board of examiners is forbidden to entertain a demand against the state once rejected by it, unless such facts are presented to the board as between individuals would be ground for a new trial. (Id.)
5. **VOID JUDGMENT OR ORDER—EFFECT OF DISMISSAL OF APPEAL.**—The dismissal of an appeal from a void judgment or order is an affirmation thereof only in a limited sense, and imparts no validity thereto. (Id.)

RECLAMATION DISTRICT.

1. **TITLE BY DEED UPON CONDITION SUBSEQUENT—RIGHT OF GRANTEE—REVERSION TO GRANTOR OR ASSIGNS.**—Under a deed to a reclamation district for the purposes of reclamation only which provides that if the land shall cease to be used for such purposes the same shall revert to the grantor, and the interest of the grantee shall cease, the grantee has no right to use the land principally for other or different purposes; and if the reclamation district or its assigns should cease to use the land for the purposes specified, it would revert to the grantor or his assigns. (*Reclamation District No. 551 v. Van Loben Seis*, 181.)
2. **PRESUMPTION AGAINST FORFEITURE—BURDEN OF PROOF.**—Every presumption is against a forfeiture of the estate of the reclamation district, and the burden is on the party claiming that the land has reverted to the grantor to show clearly that the land has ceased to be used for the prescribed purpose of reclamation. Conditions providing for the forfeiture of an estate are to be construed liberally in favor of the holder of the estate and strictly against the enforcement of the forfeiture. (*Id.*)
3. **RECLAMATION NOT ENDED—FINDING SUPPORTED BY EVIDENCE—JUDGMENT PROTECTING RIGHTS.**—Where the evidence shows that the work of reclamation was not ended, and that use was still made of the land by the reclamation district, a finding that the land has never ceased to be used for reclamation purposes is sufficiently supported; and where the judgment for the plaintiff protects the rights of appellant, and provides that where the "property shall cease to be used for reclamation purposes it shall revert" to the appellant, who is the assignee of the grantor, the appellant is entitled to no relief. (*Id.*)
4. **JUDGMENT DEFINING RIGHTS BETWEEN RECLAMATION DISTRICT AND ITS ASSIGNEE.**—The fact that the judgment for the plaintiff defines the rights of the plaintiff and its assignee as between themselves is no concern of the appellant. (*Id.*)
5. **TRIAL—WAIVER OF OBJECTION—AGREEMENT UPON FACTS—EVIDENCE NOT OBJECTED TO.**—Where the record shows that all the parties agreed on certain facts, and no objection was made to evidence on the ground that no issue was joined by the pleadings justifying such evidence, objection upon that ground was waived. (*Id.*)
6. **MARRIED WOMAN—NON-JOINDER OF HUSBAND—WAIVER.**—The appellant waived objection on the ground that she was a married woman and that her husband was not a party to the action when she did not raise the objection in the lower court by demurrer or answer. (*Id.*)

RECORDATION. See *Bona Fide Purchaser*.

SALE.

1. **SALE OF STOCK—ACTION FOR PURCHASE MONEY—OFFER AND ACCEPTANCE—DIRECTION FOR DRAFT—SETTING APART OF STOCK—DELIVERY.**—An action may be maintained for the purchase price of cer-
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SALE (Continued).

tain shares of the stock of a corporation sold by plaintiff to the defendant, where it appears that, as the result of correspondence, there was a complete offer and acceptance for the purchase and sale thereof, with direction to the plaintiff to draw upon the defendant for the purchase money, without direction as to delivery, and that the plaintiff complied with such direction and set apart the stock for the use of the defendant, and requested information as to the mode of its issuance, and tendered the stock thereafter within a reasonable time. In such case there was a completed sale of the stock, as to which an immediate delivery was not essential. (*Mason v. Lievre*, 517.)

2. REVOCATION BEFORE DELIVERY—ABSENCE OF AGREEMENT AS TO TIME.

—There having been no agreement as to the time of delivery of the stock, and the contract of sale having been complete before delivery, the contract bound both parties, and the defendant could not revoke the contract before actual delivery and tender of the shares within a reasonable time, on the ground that they did not accompany the draft. (*Id.*)

3. TRANSFER OF STOCK—IDENTIFIED SHARES—PASSAGE OF TITLE.

Where the vendor had complied with what was required on his part, and it only remained for the vendee to designate as to the mode of transfer of the stock, which was ready for immediate delivery, and it is evident that if the stock had been delivered immediately to the vendee in San Francisco, it must have been returned to Honolulu for transfer on the books, if desired, the request for an intimation of such desire did not affect the passage of the title to the identified shares of stock sold, which were set apart by the vendor to the use of the vendee. (*Id.*)

4. SACKS OF BARLEY—ACCEPTANCE AND RETENTION BY VENDEE—ACTION FOR PRICE—OFFSET—DAMAGE BY RAIN.

—Whether a sale of specified sacks of barley be absolute or an executory agreement for the sale thereof, if the vendee, without protest or attempt to rescind, or offer to return the property, accepted, retained and used it, he cannot in an action for the agreed price offset damage caused by the rain to the barley delivered in the absence of a breach of warranty on the part of the vendors. (*Browning v. McNear*, 272.)

5. AFFIRMANCE OF SALE—ESTOPPEL OF VENDEE.

—The acceptance and retention of the property sold by the vendee, in the absence of fraud or breach of warranty, is an affirmance of the sale which renders the vendee liable for the purchase money, and precludes him from alleging that the property is not of the character and quality called for by the contract. (*Id.*)

6. REMEDY FOR BREACH OF WARRANTY.

—Where there is a warranty, and it is discovered after delivery that there has been a breach thereof, the vendee may retain the property, and either sue independently for the breach or may plead it in reduction of damages in an action for the price. (*Id.*)

SALE (Continued).

7. **IMPLIED WARRANTY—SALE OF SAMPLE—SELECTION BY VENDOR.**—Though under section 1766 of the Civil Code there is an implied warranty, where the vendor makes a sale by sample, that the bulk is equal to the sample exhibited, yet the sale is not by sample merely, because the vendor knew that the vendee, through his agent, had selected and taken samples after a personal inspection by his agent of the barley sold, unaccompanied by any act on the part of the vendor. (Id.)
8. **SOUND AND MERCHANTABLE CHARACTER—ACCESSIBILITY TO BUYER.**—An implied warranty that merchandise sold is sound and merchantable exists under section 1771 of the Civil Code only where the merchandise is inaccessible to the examination of the buyer. That section has no application where the merchandise was not only accessible to the buyer, but was in fact inspected and examined by him, through his agent, prior to the contract of sale. (Id.)
9. **AGREEMENT FOR PRESENT TRANSFER—QUESTION OF FACT—LIABILITY FOR SACKS NOT DELIVERED.**—The existence of an agreement for a present transfer of the sacks sold is a question of fact; and the liability of the vendor for the price of sacks not delivered depends upon the question of fact whether the sale was absolute and the title passed to such sacks. (Id.)
10. **DEFERMENT OF PAYMENT TO TIME OF SHIPMENT.**—The mere fact that payment for the grain was expressly deferred to the time of shipment, and was to be made only against the shipping receipts, does not conclusively establish a purchase as of that time, or that there was no prior agreement for a present transfer of the property. (Id.)
11. **LIMITATIONS UPON AUTHORITY OF AGENT NOT COMMUNICATED.**—In determining the question as to what the agreement of sale actually was, limitations as to the general transaction privately placed by defendant, upon the general authority of his agent, not communicated to the plaintiff, cannot, under the circumstances of this case, play any part. (Id.)

SAN FRANCISCO. See Execution, 9, 10.

STATUTE OF LIMITATIONS.

1. **FORECLOSURE OF MORTGAGE—STATUTE OF LIMITATIONS—DEATH OF ONE MORTGAGOR.**—The death of one of two mortgagors does not have the effect to suspend the statute of limitations as to the other mortgagor or as to his grantee. (*Hibernia Savings and Loan Society v. Boland*, 626.)
2. **BAR APPEARING UPON FACE OF COMPLAINT—DEMURRER—ANSWER—OBJECTION TO EVIDENCE—ABSENCE OF FINDING.**—Where the bar of the statute as to the defendants other than the administrator of the deceased defendants appeared upon the face of the complaint, a demurrer to the complaint on that ground was improperly over-

STATUTE OF LIMITATIONS (Continued).

ruled; and the objection is not cured where the answer set up the bar of the statute, and such defendants at the trial objected to evidence of the mortgage on the ground that it was barred as to them, and there is no finding of fact express or implied to the contrary. (Id.)

2. **CONSTRUCTION OF FINDINGS—CONCLUSIONS OF LAW—PLEA OF STATUTE NOT DEFEATED.**—Where there was no finding upon the plea of the statute, nor of facts from which such finding may be inferred, conclusions of law based upon specific facts found, which were the only facts put in evidence as to the effect of an unrecorded deed from the wife to the husband prior to its record, and as to the deed being subject to the mortgage, and as to the right of foreclosure against them, cannot defeat the plea of the statute. (Id.)

See Banks, 3, 4; Estates of Deceased Persons, 10, 11; Execution, 4, 5; Husband and Wife, 6; Pleading, 14; Street Assessment, 5.

SCHOOLS.

1. **SCHOOL LAW—DISMISSAL OF TEACHER—ABSENCE OF CERTIFICATE.**—A teacher who has never held a city or city and county certificate does not come within the terms of section 1793 of the Political Code, providing that holders of such certificates shall be dismissed only for insubordination or other causes. (Stockton v. Board of Education of the City of San Jose et al., 246.)
2. **SAN JOSE CHARTER—CONSTRUCTION—"PERMANENT POSITIONS"**—**DISMISSAL AT END OF YEAR.**—Upon a proper construction of the original charter of San Jose, the only "permanent positions" of teachers thereunder were of those who were reported favorably by the classification committee of the board of education at the close of the school year, and a teacher not protected by the Political Code may be dismissed at the end of any school year under that charter upon failure of the classification committee to recommend a retention of said teacher for the ensuing year. (Id.)

STATUTES. See Constitutional Law.

STOCK AND STOCKHOLDERS. See Banks.

STREET ASSESSMENT.

1. **FORECLOSURE OF STREET ASSESSMENT—ABSENCE OF NOTICE OF LIE PENDENS—PURCHASER PENDENTE LITE NOT CONCLUDED.**—Section 409 of the Code of Civil Procedure, as to the filing of notice of *lie pendens*, applies to an action to foreclose the lien of a street assessment, and in the absence of such filing there is no constructive notice of its pendency, and a purchaser who took title from the defendant pending such action, without actual notice of its pendency, and who was

STREET ASSESSMENT (Continued).

not a party to the judgment foreclosing the lien, is not bound thereby. (Page v. Chase Company, 578.)

2. **PROCEEDING NOT IN REM.**—Upon the foreclosure of a street assessment the land is not a party, and it is not a proceeding *in rem*, except in the sense that the amount of the lien can be collected only out of the amount of the property involved in the action. The judgment for the sale of the property is not binding upon the world, and can only affect the interest of an owner made a party to the action or affected with notice thereof. (Id.)
3. **CONCLUSIVENESS OF JUDGMENT—CONSTRUCTION OF CODE—NOTICE OF PENDENCY OF ACTION.**—The provision in subdivision 2 of section 1908 of the Code of Civil Procedure, that a judgment is conclusive with respect to the matter directly adjudged between the parties and their successors in interest by title subsequent to the commencement of the action, is by the concluding clause of the section applicable only to those cases where the parties have had "notice actual or constructive of the pendency of the action." (Id.)
4. **EFFECT OF DISMISSAL—FINDING AND JUDGMENT AGAINST VENDOR—PURCHASER NOT BOUND.**—Where the purchaser was served with summons under a fictitious name, after he had obtained title *pendente lite*, without prior notice actual or constructive of the pendency of the action, by the dismissal of the action as to the defendants sued by fictitious names the purchaser ceased to be a party to the suit, and where a finding and judgment were thereafter had against the former owner, adjudging her to be the sole owner of the land involved, the effect of the proceeding is the same as if the action had been originally brought against her alone, and the purchaser is not bound by such finding and judgment. (Id.)
5. **STATUTE OF LIMITATIONS—CONTINUANCE OF LIEN—DISCHARGE AGAINST PURCHASER.**—The lien of a street assessment continues for two years only, and where the purchaser took title without notice actual or constructive of the commencement of the action, and after the lapse of two years from the date of the lien, he took the title discharged from the lien. (Id.)
6. **PURCHASE OF LAND SUBJECT TO LIEN OF STREET ASSESSMENT—INAPPLICABLE RULE—ABSENCE OF PERSONAL LIABILITY.**—The title of the purchaser is not affected by the judgment foreclosing the street assessment against the vendor by reason of a provision in the conveyance that it was "subject to any existing lien for street-work." The rule as to the assumption of a mortgage or lien by a purchaser does not apply where the vendor has no personal liability. There is no personal liability for a street assessment, and there can be no deficiency judgment in an action for its foreclosure. Such provision created no personal liability for the amount of the assessment. (Id.)

STREETS, ROADS, AND HIGHWAYS. See Eminent Domain.

SUMMONS.

1. **SUBSTITUTED SERVICE—JURISDICTION OF DEFENDANT—CONDITIONS—RETURN.**—A substituted service of summons in an action purely *in personam* is a radical departure from the ordinary method of procedure whereby jurisdiction is obtained over the defendant, and the authority to make it must be strictly followed, and the existence of the conditions upon which such service depends must be shown affirmatively by the return. (*Wiley v. The Benedict Company*, 601.)
2. **SERVICE UPON FOREIGN CORPORATION—LEAVING COPY WITH SECRETARY OF STATE—INSUFFICIENT RETURN—CONDITION NOT SHOWN.**—A sheriff's return of the service of summons upon a foreign corporation doing business in this state, by leaving a copy of the summons and complaint with the secretary of state, which wholly fails to show the necessary condition that the records in the office of the secretary of state disclose that no person has been designated by the corporation for that purpose, is insufficient to show jurisdiction of the defendant and to support a judgment by default. (*Id.*)
3. **SPECIAL APPEARANCE—MOTION TO QUASH SERVICE AND VACATE JUDGMENT—WANT OF JURISDICTION.**—Upon the special appearance of the defendant corporation for that purpose its motion to quash the service of the summons and to vacate the judgment by default for want of jurisdiction of the defendant appearing upon the record was properly granted. (*Id.*)
4. **CERTIFICATE OF SECRETARY OF STATE NOT PART OF RETURN OR RECORD.**—A certificate by the secretary of state attached to the returned summons that the defendant corporation had designated no person upon whom service might be made is not provided for by statute as evidence of that fact in aid of the sheriff's return, and is not part of his return or of the record of the judgment by default, and cannot be considered for any purpose upon a motion made upon the record to quash the service and vacate the judgment. (*Id.*)
5. **APPEAL—ORDER GRANTING MOTION—AFFIDAVITS NOT PART OF RECORD.**—Where none of the affidavits, or the substance of them, offered by the plaintiff upon the defendant's motion to quash the service of the summons and to vacate the judgment by default, and not admitted in evidence, were made part of the record upon appeal from the order granting the motion, the refusal to admit them in evidence cannot be considered. (*Id.*)

SURETIES.

1. **PRINCIPAL AND SURETY—CONTRACT FOR SPECIFIED MATERIALS FOR BUILDING—TOTAL BREACH—DAMAGES—EXCESS OF PRICE—LIABILITY OF SURETY.**—Upon the total breach of the bond of a materialman to supply specified materials to building contractors according to the plans and specifications of the architects and to their satisfaction, the surety company is liable in damages to the extent of the

SURETIES (Continued).

bond for the excess of price which the building contractors were compelled to pay for the materials contracted for above the contract price. (*Bateman Brothers v. Mapel*, 241.)

2. **INSUFFICIENT DEFENSE—MONEY ADVANCED TO PRINCIPAL—SURETY NOT INJURED.**—It is not a sufficient defense by the surety to an action on the bond for such damages that the building contractors, without the previous approval of the architects, and without the knowledge of the surety, advanced large sums of money to the principal for the purpose of enabling him to purchase satisfactory materials of the kind contracted for, which he failed to do, where the surety was not injured thereby, and no part of the money so advanced was sought to be recovered from the surety. (*Id.*)

See *Execution*, 7; *Negotiable Instrument*, 2-4.

TAXATION. See *Estates of Deceased Persons*, 24; *Mortgage*, 10.

TENANTS IN COMMON. See *Husband and Wife*, 14, 15.

TRESPASS. See *Injunction*.

TRUSTS.

1. **PARTITION—TERMINATION OF TRUST—MORTGAGE LIEN.**—The right of a tenant in common to maintain an action for partition is not affected by the lien of a mortgage upon his share which may be discharged at any time by payment of the debt secured; nor is it affected by a prior trust in the land created by all of the tenants in common, which, if valid, has terminated by the cessation of the estate of the trustee therein. (*Gardiner v. Cord*, 157.)
2. **VALIDITY OF TERMINATED TRUST—RECONVEYANCE NOT ESSENTIAL.**—It is immaterial to the maintenance of the action for partition whether the terminated trust was valid or invalid in its creation; since if valid it has terminated, and the rights of the owners of the land can be adjudicated in equity, or in the action for partition, without the necessity of an actual reconveyance thereof by the trustees. (*Id.*)
3. **MORTGAGE BY TRUSTEES—CONTRAVENTION OF TRUST—AGREEMENT BY COTENANTS FOR PROPORTIONATE LIABILITY.**—Although a mortgage executed by the trustees as such in contravention of the terms of the trust was void in law, yet where it appears to have been executed by some of the cotenants to secure the debt which was satisfied by the new mortgage, an agreement for proportionate liability for the original debt as between the cotenants will be deemed to apply to the mortgage, and make it, as between themselves, a lien upon the share of each cotenant, to the extent of his proportion of liability for the debt secured. (*Id.*)
4. **TRUST UNDER WILL—JURISDICTION—DETERMINATION OF RIGHTS—TERMINATION OF TRUST—POWER TO ORDER PROPERTY DELIVERED.**—

TRUSTS (Continued).

Independent of the necessity to determine who are interested as beneficiaries under a trust created by will, arising from a dispute over specific items of an account rendered by the trustees, or over the right to contest the same, the superior court having jurisdiction over the trust, under section 1699 of the Code of Civil Procedure, has general power, upon final settlement at the termination of the trust, to declare it terminated, and to dispose of the entire matter of the trust, by determining who is entitled to the property, and directing the trustees to turn it over to the person or persons entitled thereto. (*McAdoo v. Sayre*, 344.)

5. **NATURE OF JURISDICTION.**—Jurisdiction for a certain purpose necessarily includes authority to do all things necessary to accomplish that purpose which can be done by the means afforded. (*Id.*)
6. **NATURE OF ACCOUNTING BY TRUSTEES—DISPOSITION OF TRUST PROPERTY.**—Trustees who have the possession of trust property, under the terms of the instrument creating the trust, are chargeable in their accounts with the whole of the estate committed to them, and they have not fully accounted until the entire estate is finally disposed of, and they will remain subject to be called to account until this is done and the trust is fully executed and the trustees are entitled to their discharge. (*Id.*)
7. **DUTY OF COURT.**—The court has the power, under section 1699 of the Code of Civil Procedure, and it is its duty wherever the power is invoked, to ascertain who is entitled to the trust estate already delivered by the trustees, and also that which yet remains to be delivered, and to make such orders as may be necessary to enable the trustees to make final settlement with the beneficiary in safety and secure a final settlement of his account which will entitle him to a discharge. (*Id.*)
8. **PROHIBITION—REMEDY BY APPEAL.**—The writ of prohibition will not lie to prevent action by the court, on the ground that the trustees had failed to comply with the provision of law requiring them to name the beneficiaries in their report, nor on the ground of anticipation of error by the court in ordering the property delivered to one who claims under the will of a deceased beneficiary before the time for contest of the will has expired, there being a sufficient remedy by appeal in each case. (*Id.*)

See Assignment, 4, 5; Corporations, 3-7; Husband and Wife, 4-6.

TRIAL.

1. **EJECTMENT—REPORTER'S PER DIEM—RULE OF COURT—FAILURE OF DEFENDANT TO OBEY ORDER—JUDGMENT WITHOUT TRIAL—POWER OF COURT.**—The superior court had no power, for the mere failure of the defendant in an action of ejectment to obey its order for the immediate deposit of one-half of the per diem of the reporter, as fixed and required by a rule of court, to order judgment for the plaintiff for recovery of the land of which the defendant was in

TRIAL (Continued).

possession without any trial of the cause, and without any evidence of plaintiff's right thereto, or affording to the defendant an opportunity to reply to any evidence the plaintiff might adduce. (*Meacham v. Bear Valley Irrigation Company*, 606.)

2. **CONSTITUTIONAL LAW—DUE PROCESS OF LAW.**—The guarantee of the constitution that the defendant shall not be deprived of his property without due process of law gives him the right to be heard in its defense against any claim that may be made against him for its possession; and he cannot be deprived of this right of defense as a penalty for failure to comply with a rule of the court, or for failure or refusal to pay any part of the costs of the action in advance of a trial. (*Id.*)

VENDOR AND VENDEE. See *Contract*, 1, 4.

VENUE. See *Place of Trial*.

WATER AND WATER-RIGHTS.

1. **WATER-RIGHTS—QUIETING TITLE—USER BY RIPARIAN OWNER—FINDING AGAINST EVIDENCE.**—In an action to quiet title to waters of a creek having rise in a spring on the land of the defendant and flowing into the land of plaintiff, evidence which goes no farther than to show that the defendant had been making such reasonable use of the water for domestic purposes and for irrigation as he was entitled to as a riparian owner is inconsistent with a finding that for more than six years the defendant had adversely diverted and used all the waters of the spring and creek. (*Gutierrez v. Wege*, 780.)
2. **ADVERSE USE—PRESCRIPTIVE RIGHT.**—A use of the water strictly within the legal rights of a riparian owner, and with which no other person has a right to interfere, cannot be called an adverse use for the purpose of conferring a property right or ownership in the water under the statute of limitations. (*Id.*)
3. **RIGHTS OF RIPARIAN OWNER.**—The water of a riparian stream is parcel of the land; and one riparian owner as against a lower one is entitled only to a reasonable use of the water upon his land, with no power to convey it elsewhere to the detriment of the lower riparian proprietor. If he should acquire rights by user, he does not become the absolute owner, and his rights would be limited by the extent of the user. (*Id.*)
4. **INCREASED FLOW FROM SPRING.**—It may be that if the first riparian proprietor had increased the flow by digging out the spring on his land, he would be entitled to a greater portion of the stream on a fair division of it; but such increased flow would not entitle him to all of the waters naturally flowing from the spring into the creek. (*Id.*)
5. **OBSTRUCTION OF STREAM—INJUNCTION.**—It is not consistent with the law of riparian rights to enjoin a riparian owner from obstruct-

WATER AND WATER-RIGHTS (Continued).

- ing in any wise the riparian stream. Some obstruction of it is necessary in order to make any use of the water for irrigation or for domestic or house use. There are some circumstances under which the upper proprietor may properly divert and consume the entire stream, for a time at least, without actionable wrong. (Id.)
6. **DECREE TO FIT STREAM—ALTERNATE USE.**—The decree settling water-rights as between riparian proprietors should be made to fit the stream it applies to; but where the stream is small the parties, as a general rule, can best be served by giving them the alternate use of the entire stream. (Id.)
7. **COSTS—DISCRETION OF COURT.**—In an action to quiet title to a riparian stream a part of the decree, that neither party recover costs, is within the equitable discretion of the trial court. (Id.)
8. **WATER-RIGHTS—FINDING AS TO SLOUGH—CONSISTENCY OF FINDINGS.**—Upon an appeal so taken from a judgment determining water-rights in the San Joaquin River, a finding that Fresno Slough, upon which the lands of a defendant border, was no part of said river, but was a part of Kings River, is conclusive as to that fact, and is not inconsistent with a finding that at certain stages of the river, or at certain times, some of the water of the San Joaquin River will flow into the slough, and when the level changes will flow back into such river. (Miller & Lux v. Enterprise Canal and Land Company, 652.)
9. **NEED OF WATER—OCCASIONAL OVERFLOW—CONSTRUCTION OF FINDINGS.**—A finding that plaintiff corporation has need of the water of the San Joaquin River appropriated by it is not affected by the further finding that at certain times in each year the river for a short time overflows its banks on to defendants' lands, thus wetting and benefiting the same, and such findings do not show that defendants are entitled to divert some of the water of the river because not needed by plaintiff. (Id.)
10. **FINDING OF WANT OF EVIDENCE—INCREASE OF FLOW—RESERVATION IN JUDGMENT—DEFENDANTS NOT PREJUDICED.**—A finding that at certain times there is an increase of the flow of the water in the river over ordinary stages, but that there is no evidence before the court whereby it can be determined at what stages of the waters thereof at such times, if at all, water can be diverted therefrom without injury or danger to the plaintiff, and a reservation to the defendants in the judgment of the right to bring an action for the determination of that question, are not prejudicial to the appellants, and are not ground of reversal of the judgment. (Id.)
11. **APPEAL FROM ORDER GRANTING NEW TRIAL—CONFLICT OF EVIDENCE.**—Upon appeal from an order granting a new trial, generally, where one of the specifications is for insufficiency of the evidence, the order will be affirmed if there is fairly conflicting evidence as to any material finding of fact; and where the evidence is fairly con-

WATER AND WATER-RIGHTS (Continued).

fictitious as to the finding that Fresno Slough was no part of the San Joaquin River, the order must be affirmed. (Id.)

WILLS.

1. **HOLOGRAPHIC WILL—DATE—LIST OF PROPERTY.**—A holographic will commencing with the words "Property of S. W. Clisby, October 1, 1902," followed by a list of his property, and giving all of his property to his wife, is sufficiently dated. It is immaterial that the latter part of the will containing the bequest was written on a subsequent day. The testator may adopt as the date of his will the date previously written by him. (Estate of Clisby, 407.)
2. **PETITION TO REVOKE PROBATE—DEMURRER—INTENTION OF TESTATOR NOT ALLEGED.**—Where a demurrer was properly sustained to a petition to revoke the probate of the holographic will, upon the facts alleged, and there is nothing in the petition to indicate that the document probated as a will was not in intention one continuous instrument, the question will not be considered as to an intention, not alleged, to make a mere list of property, with no thought of making a will, and as to a subsequent intention, not alleged, to make it a will as a mere afterthought. (Id.)
3. **INHERITANCE BY POST-TESTAMENTARY CHILD—CONTRIBUTION BY DEVISEES AND LEGATEES—ANNUITY TO MOTHER OF TESTATOR.**—A child born after the making of the last will of a deceased testator is entitled to inherit the same share of the estate as if no will were made; and all devisees and legatees must contribute proportionately to such share, if there is no obvious intention of the testator to the contrary. In the absence of such obvious intention shown from the words of the will, a specific monthly annuity bequeathed by the testatrix to her mother must, as a legacy, contribute a proportionate share of such inheritance. (Estate of Smith, 118.)
4. **CHILD ABOUT TO BE BORN—PRESUMED KNOWLEDGE OF LAW—OBVIOUS INTENTION NOT SHOWN.**—The fact that the testatrix was soon to give birth to a child when the will was made is not sufficient proof of an obvious intention that the legacy of the annuity given to the mother should not contribute to the legal inheritance of the post-testamentary child. Though she was probably actually ignorant of the law as to such inheritance, she must be presumed to know it, and to know that the mother must contribute proportionately thereto, unless a contrary intention was made manifest by the terms of the will. (Id.)
5. **CONTEST AFTER PROBATE—CONTINUANCES—DISMISSAL OF CONTEST—DISCRETION NOT ABUSED.**—Where more than one year had elapsed after the trial of a contest of a will after probate, at which the jury had disagreed, and the case, after being reset, was continued several times on account of the withdrawal of other attorneys and the illness of an attorney, who was not present at the first

WILLS (Continued).

trial, and there was no appearance, except to move for a further continuance, after ample time had been allowed to secure other attorneys, it was not an abuse of discretion to refuse to grant another continuance, and, where the contestant declined to proceed, to dismiss the contest. (Estate of Bollinger, 751.)

See Ejectment, 2; Estates of Deceased Persons; Trusts, 4-8.

